DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-798
Title: American Trucking Associations, Inc., Petitioner
v.
City of Los Angeles, California, et al.
Docketed: December 23, 2011
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (10-56465)
Decision Date: October 31, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Dec 22 2011	Petition for a writ of certiorari filed. (Response due January 23, 2012)
Jan 4 2012	Order extending time to file response to petition to and including February 21, 2012, for all respondents.
Jan 23 2012	Brief amici curiae of Center for Constitutional Jurisprudence, et al. filed.
Jan 23 2012	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Jan 23 2012	Brief amicus curiae of Owner-Operator Independent Drivers Association, Inc. filed.
Jan 23 2012	Brief amicus curiae of Airlines for America filed.
Feb 21 2012	Brief of respondents National Resources Defense Council, et al. in opposition filed.
Feb 21 2012	Brief of respondents City of Los Angeles, California, et al. in opposition filed.
Mar 2 2012	Reply of petitioner American Trucking Associations, Inc. filed.
Mar 7 2012	DISTRIBUTED for Conference of March 23, 2012.
Mar 26 2012	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Nov 30 2012	Brief amicus curiae of United States filed.
Dec 10 2012	Supplemental brief of petitioner American Trucking Associations, Inc. filed.
Dec 12 2012	DISTRIBUTED for Conference of January 4, 2013.
Jan 7 2013	DISTRIBUTED for Conference of January 11, 2013.
Jan 11 2013	Petition GRANTED limited to Questions 1 and 3 presented by the petition.
Feb 11 2013	SET FOR ARGUMENT ON Tuesday, April 16, 2013.
Feb 15 2013	Brief of petitioner American Trucking Associations, Inc. filed.
Feb 15 2013	Joint appendix filed. (Statement of costs filed.)
Feb 22 2013	Brief amicus curiae of the United States supporting reversal filed.

Feb 22 2013	Brief amici curiae of Owner-Operator Independent Drivers Association, Inc. filed.
Feb 22 2013	Brief amicus curiae of Airlines for America filed.
Feb 22 2013	Brief amicus curiae of California Construction Trucking Association filed.
Feb 22 2013	Brief amicus curiae of Center for Constitutional Jurisprudence and Harbor Trucking Association filed.
Feb 22 2013	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Feb 25 2013	Record from U.S.C.A. for 9th Circuit is electronic.
Feb 25 2013	Record from U.S.D.C. for Central District of California is electronic.
Mar 1 2013	CIRCULATED.
Mar 18 2013	Brief of respondents City of Los Angeles, California, et al. filed. (Distributed)
Mar 18 2013	Brief of respondents National Resources Defense Council, et al. (Distributed) filed.
Mar 25 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 25 2013	Brief amicus curiae of Los Angleles Chamber of Commerce filed. (Distributed)
Mar 25 2013	Brief amici curiae of National Organization of Counties, et al. filed.
Mar 25 2013	Brief amicus curiae of Airports Council International - North America filed.
Mar 25 2013	Brief amici curiae of California and Washington filed. (Distributed)
Apr 1 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 5 2013	Reply of petitioner American Trucking Associations, Inc. filed. (Distributed)
Apr 16 2013	Argued. For petitioner: Daniel N. Lerman, Washington, D. C., and John F. Bash, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

FILED
DEC 22 2011
OFFICE OF THE CLERK

No. 11-798

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title 49 U.S.C. § 14501(c)(1), originally enacted as a provision of the Federal Aviation Administration Authorization Act of 1994, provides that "a State [or] political subdivision . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." It contains an exception providing that the express preemption clause "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." *Id.* § 14501(c)(2)(A). The questions presented are:

1. Whether an unexpressed "market participant" exception exists in Section 14501(c)(1) and permits a municipal governmental entity to take action that conflicts with the express preemption clause, occurs in a market in which the municipal entity does not participate, and is unconnected with any interest in the efficient procurement of services.

2. Whether a required concession agreement setting out various conditions a motor carrier must meet to serve a particular port imposes any requirements that are "related to a price, route, or service of any motor carrier" for the purposes of preemption under Section 14501(c)(1).

3. Whether permitting a municipal governmental entity to bar federally licensed motor carriers from access to a port operates as a partial suspension of the motor carriers' federal registration, in violation of *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954).

RULE 14.1(b) STATEMENT

Petitioner is the American Trucking Associations, Inc., plaintiff-appellant below.

Respondents are the City of Los Angeles, the Harbor Department of the City of Los Angeles, and the Board of Harbor Commissioners of the City of Los Angeles, all defendants-appellees below, and Natural Resources Defense Council, Sierra Club, and Coalition for Clean Air, Inc., all defendants-intervenors-appellees below.

RULE 29.6 STATEMENT

Petitioner has no parent companies or non-wholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals, as amended October 31, 2011 (App. 1a-58a), is reported at 660 F.3d 384. The opinion of the district court (App. 59a-137a) is unreported. The earlier opinions of the court of appeals in connection with petitioner's request for a preliminary injunction (App. 138a-148a, 208a-238a) are reported at 596 F.3d 602 and 559 F.3d 1046. The district court opinions issued in connection with the preliminary injunction (App. 149a-207a, 239a-272a) are unreported.

JURISDICTION

The court of appeals' judgment was entered on September 26, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Supremacy Clause of the Constitution and of the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501 *et seq.*, are reproduced at App. 273a-279a.

STATEMENT

This case raises important and recurring questions that have divided the circuits concerning three subjects. The first is the preemptive scope of the Federal Aviation Administration Authorization Act ("FAAAA"). The second is the scope and applicability of the "market-participant exception"—first recognized in the dormant Commerce Clause context—to an express preemption scheme such as that set out by the FAAAA. The third is the enduring vitality of this

Court's decision in *Castle* v. *Hayes Freight Lines., Inc.*, 348 U.S. 61 (1954), under the deregulatory scheme created by the FAAAA.

As the dissent below observes, the majority's opinion creates conflicts with at least one other circuit over whether the "market participant" defense can be invoked by a governmental entity to save its actions from preemption when (a) the governmental entity owns property on which the market operates but does not actually participate in the market in which it is imposing conditions, and (b) the conditions are unrelated to the efficient procurement of services. The decision below also entrenches and extends a longstanding conflict with the First, Second, Fourth, Fifth, Seventh, and Eleventh Circuits over the meaning of the preemption clause's coverage of state and local requirements "related" to motor carriers' "price[s], route[s], or service[s]" (49 U.S.C. § 14501(c)(1)). Finally, the decision below conflicts with *Castle*, a longstanding precedent of this Court precluding States from enforcing regulations through actions that (as here) amount to a partial suspension of a federally licensed motor carrier's grant of nationwide operating authority.

A. The Deregulatory Scheme of the FAAAA

In 1994, Congress enacted the FAAAA, complementing the earlier-enacted Motor Carrier Act of 1980 ("MCA"). The MCA had broadly deregulated the trucking industry at the federal level. The FAAAA prevented state and municipal governments from counteracting that policy through their own regulation of motor carriers. Congress believed state economic regulation of motor carrier operations resulted in "significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and

technology and curtail[ment of] the expansion of markets." H.R. Conf. Rep. No. 103-677, at 86 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758. Congress concluded that broad preemption was required to free interstate carriers from the inefficiencies created by a multitude of local regulatory schemes.

The FAAAA therefore provides that a State or its political subdivision "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The Act provides for limited exceptions, including a provision noting that it "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." *Id.* § 14501(c)(2)(A). Nevertheless, the general scope of the FAAAA's express preemption clause—modeled after language in the Airline Deregulation Act ("ADA")—is expansive. *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008). Broad preemption fosters a deregulatory policy aimed at ensuring that prices, routes, and services reflect "'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices.'" *Id.* at 371 (quoting *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)).

B. The Port's Mandatory Concession Agreements

This litigation arises out of restrictions imposed by the Port of Los Angeles on motor carriers seeking to contract with shipping lines that lease terminal space at the Port. The Port is an independent division of the City of Los Angeles, occupying land granted to the City by the State of California. App. 5a. The Port acts much like a "landlord," developing terminal

facilities that it leases to shipping lines and stevedoring companies in exchange for property leases and fees. App. 5a-6a, 71a. The Port is a major avenue of interstate and foreign commerce, handling more containerized cargo than any other port in the country. App. 6a.

The Port has no non-regulatory interaction with the drayage trucks that transport cargo from the Port to customers or to other trucking or railroad facilities. Cargo from the ships docked at the Port is unloaded by terminal operators into marine terminals. Cargo owners, ocean carriers, railroads, and other providers of freight transportation then arrange for drayage services through federally licensed motor carriers (LMCs).[1] Before 2008, these LMCs frequently provided drayage services with and through independent contractors who owned and operated the drayage trucks. The Port does not itself contract with any drayage providers. App. 6a.

In 2008, the Port began prohibiting its tenant terminal operators from allowing drayage trucks to enter their terminal facilities unless the drayage trucks were operated by motor carriers that had first agreed to enter into "concession agreements" with the Port imposing multiple requirements on the carriers and their operations. App. 3a-4a, 12a. This measure was enacted as part of a larger "Clean Truck Program," designed in response to environmentally grounded legal and political opposition to the Port's expansion. App. 4a.

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[1] A motor carrier engaged in interstate commerce receives operating authority from the Department of Transportation, under the registration provisions of the MCA, 49 U.S.C. § 13902, and must comply with safety regulations and inspection requirements promulgated under the Federal Motor Carrier Safety Act, *id.* §§ 31136, 31142.

Of the 14 requirements imposed under the concession agreements on motor carriers, five remain at issue. These require a motor carrier seeking to serve the Port to (1) transition over five years to the use of only employee-drivers rather than independent owner-operators (the "employee-driver provision"); (2) submit an "off-street parking plan," including parking locations for all "Permitted Trucks," and ensure that Permitted Trucks comply with municipal parking restrictions (the "off-street-parking provision"); (3) ensure that maintenance of all Permitted Trucks is conducted in accordance with the manufacturers' instructions, with the concessionaires responsible for vehicle condition and safety (the "maintenance provision"); (4) post placards on Permitted Trucks while the trucks are entering, leaving, or on Port property, providing a number for members of the public to call with concerns regarding truck emissions, safety, and compliance (the "placard provision"); and (5) demonstrate to the satisfaction of the Port's Executive Director that the concessionaire possesses the financial capability to perform its obligations under the agreement (the "financial-capability provision"). App. 12a-13a.

C. Prior Proceedings in This Case

Petitioner American Trucking Associations, Inc. ("ATA"), a national association of motor carriers, sued to challenge the mandatory imposition of these agreements, arguing that the Port's requirements are preempted by the FAAAA. App. 4a.

The district court originally denied a preliminary injunction entirely. The court acknowledged that the concession-agreement requirements fell within the FAAAA's preemption clause and the Port's action could not be justified as that of a market participant.

App. 247a-248a, 252a-261a. But, the court held, the fact that some of the provisions could be upheld under the vehicle-safety exception saved the agreements from preemption in their entirety. App. 266a.

A unanimous panel of the Ninth Circuit agreed that the agreements likely fell within the FAAAA's preemption clause, explaining: "[t]hat the Concession agreements relate to prices, routes or services of motor carriers *can hardly be doubted*." App. 221a (emphasis added). The Ninth Circuit reversed the district court regarding its application of the safety exception, holding that the court must consider whether each individual provision of the concession agreements could be justified under the safety exception. App. 229a-230a. On remand, the district court granted a preliminary injunction with respect to a number of the individual provisions of the concession agreements. App. 203a.[2]

The district court conducted a bench trial concerning a permanent injunction. ATA argued (1) that the concession agreements were *per se* "related to a price, route, or service" for the purposes of FAAAA preemption, (2) that they could not be justified under the "market participant" exception, and (3) that the FAAAA's vehicle-safety exception neither justified any specific provision in the concession agreements

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[2] The district court preliminarily enjoined the employee-driver, financial-capability, and off-street-parking provisions, but not the maintenance and placard provisions. App. 203a-204a. In a later appeal, the Ninth Circuit reversed the district court again with regard to the placard provision. App. 144a. Consistent with the Ninth Circuit's prior determination that it could "hardly be doubted" that the concession agreements imposed requirements that "relate to prices, routes or services of motor carriers," App. 221a, petitioner and the City "agree[d]" on that point in this second appeal. App. 143a.

nor allowed the Port to refuse access to LMCs as a general matter. The district court held that none of the disputed provisions of the concession agreement was preempted. The court concluded that the Port was acting as a "market participant" in requiring the agreements and that specific provisions were further justified either as not "related to the price, route, or service of a motor carrier" or as falling within the exception to preemption for motor vehicle safety. App. 136a-137a.

D. The Court of Appeals' Decision

A divided panel of the Ninth Circuit affirmed in part and reversed in part. App. 47a.

1. The majority began by addressing whether the concession agreements and their individual provisions were "related to a price, route, or service of any motor carrier" such that they were preempted by the FAAAA's express preemption clause. The court of appeals noted that under Ninth Circuit precedent the phrase "price, route, or service" is understood only "in the public utility sense," referring to things such as the "frequency and scheduling of transportation" or the "courses of travel." App. 17a-18a (internal quotation marks omitted). The majority held "that a State may condition access to State property so long as the conditions do not impose costs that compel the carrier to change rates, routes, or services." App. 21a. The majority concluded that the financial-capability provision was insufficiently related to rates, routes, or services to be preempted. App. 33a-34a.

The panel also held that some provisions of the concession agreements escaped preemption under a market-participant exception nowhere expressed in the text of the FAAAA. According to the majority, agreements can escape preemption even if (a) they

were not directed at the "efficient procurement" of goods or services, and (b) the Port did not purchase the drayage services on which it imposed the disputed conditions. App. 23a-29a. In a statement that made no pretense of having anything to do with statutory text, the majority concluded that "[a] private port owner could (and probably would) enter into concession-type agreements with licensed motor carriers in order to further its goals." App. 29a.

Analyzing individual provisions of the agreements to determine whether each served the government's "interests as a facilities manager," App. 30a, the panel concluded that the off-street-parking and placard provisions were not preempted. In doing so, it held that "[e]nhancing good-will in the community surrounding the Port," App. 40a, and "receiving complaints about drayage trucks entering, leaving, and operating on its property," App. 46a, qualified as proprietary interests justifying imposition of the restrictions. None of those statements had anything to do with the text of the statute.[3]

The court also rejected petitioner's contention that—under *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954)—States cannot limit a federally registered motor carrier's access to a particular port (even to enforce vehicle-safety laws). App. 30a-32a. Without expressly deciding whether the FAAAA's enactment modified *Castle*'s holding, the majority concluded that the ban on a motor carrier's access to the Port did not so limit its participation in the

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[3] The Ninth Circuit did, however, reverse the district court with respect to the employee-driver provision. The court concluded that, "[w]hile the Port may impose conditions on licensed motor carriers seeking to operate on Port property, it cannot extend those conditions to the contractual relationships between motor carriers and third parties." App. 43a.

transport of interstate goods as to run afoul of *Castle*. App. 32a.

Finally, the panel considered the district court's application of the FAAAA's vehicle-safety exception to the maintenance provision. Acknowledging that the restriction was imposed in part as a result of *environmental* concerns, it held that such mixed motives did not preclude application of the safety exception and that the provision did respond to safety concerns. App. 36a-37a. Moreover, although the provision largely duplicated federal safety requirements, the court held that "the Port need not demonstrate that the requirement to comply with manufacturer's instructions creates safety benefits over and above those [already] created by federal law." App. 38a.

2. Judge N. Randy Smith dissented in part. App. 47a. He agreed that the FAAAA preempts the employee-driver provision but not the financial-capability provision.[4] He also agreed that the maintenance provision is not preempted. Judge Smith disagreed, however, with the panel's conclusions regarding both the market-participant exception and the effect of *Castle*.

With respect to the market-participant exception, Judge Smith noted that the majority opinion conflicts with *Smith* v. *Department of Agriculture*, 630 F.2d 1081 (5th Cir. 1980). *Smith* held that simply owning a facility does not make a government entity a par-

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[4] Although the dissent states that Judge Smith "concur[red] that the . . . financial capability provision[] [is] preempted by federal law," App. 58a, it appears he in fact agreed that this provision was *not* preempted, as the dissent provides no other indication of disagreement with the relevant portions of the majority opinion.

ticipant in a market operating within that facility. App. 49a.

Moreover, Judge Smith concluded that the majority permitted the Port to "reach[] beyond the immediate parties with whom it transacts." App. 50a. Such a holding, he noted, is in conflict with Ninth Circuit precedent and with the plurality opinion in *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82 (1984). App. 50a.

Judge Smith noted further that, even if the Port had been a participant in the relevant sense, in imposing the off-street-parking provision the Port was "attempt[ing] to address political concerns the Port alleges local community members have raised." It was not—as the market-participant doctrine requires—addressing the "efficient procurement" of goods or services. App. 56a.

Finally, Judge Smith dissented from the conclusion that the Port could completely deny access to federally licensed motor carriers. As he recognized, "*revoking access*, under *Castle*, is an enforcement mechanism beyond the reach of California and its political sub-parts, including the Port." App. 55a. As in *Castle*, barring motor carriers from accessing the largest port in the United States both "would no doubt 'seriously disrupt' drayage carriers' ability to transport goods from ships to other destinations in and outside California" and represents an impermissible "'partial suspension' of drayage carriers' federal permits to transport goods in the stream of interstate commerce." App. 55a-56a.

REASONS FOR GRANTING THE PETITION

The decision below creates and exacerbates multiple conflicts concerning important and recurring issues of federal law. It represents the first time the

market-participant exception has been recognized under the FAAAA outside the highly specific context of municipal actions taken to arrange for the provision of involuntary towing services. No such exception is even hinted at in the statute. In addition, the decision below construes this atextual exception expansively to allow a governmental entity to escape preemption in regulating a market in which it does not itself participate. And the Ninth Circuit, in conflict with previous decisions recognizing only a limited exception to FAAAA preemption, applied an exception untethered to any governmental interest in the efficient procurement of goods and services. The conflicts created by the decision below threaten to create the very patchwork of regulation that the FAAAA was enacted to prevent.

Further review would also allow the Court to resolve a circuit conflict over the scope of "related to" language in the FAAAA preemption clause. That conflict persists even after *Rowe*. The decision below reflects continuation of the Ninth Circuit's uniquely crabbed view of the meaning of the crucial phrase "rates, routes, or services."

Finally, review would allow the Court to reaffirm the continued vitality of its decision in *Castle*. Since *Castle*, federal regulatory policy related to the trucking industry has shifted from one of comprehensive regulation to one of expansive deregulation. But allowing municipal entities such as the Port here to exercise a veto power over federally licensed motor carriers remains entirely inconsistent with the uniform scheme established by Congress, and there is no indication that in enacting the FAAAA Congress intended to overturn *Castle*.

I. The Circuits Are Deeply Divided over the Scope of the "Market Participant" Exception

A. This Case Squarely Presents Two Conflicts in the Context of the FAAAA.

The Ninth Circuit assumed that certain challenged provisions of the concession agreement would be preempted but for an atextual market-participant exception to FAAAA preemption. No such exception exists *at all*, but we can assume for present purposes that the exception does exist. Even on that assumption, the decision below conflicts with two lines of case law. First, it permits a municipal entity, as a supposed market participant, to set conditions on a market in which it does not participate, in conflict with *Smith* v. *Department of Agriculture*, 630 F.2d 1081 (5th Cir. 1980). Second, it allows the Port to impose restrictions wholly divorced from any governmental interest in the "efficient procurement" of goods or services, in conflict with FAAAA decisions from other circuits.

1. The Ninth Circuit held that a State could escape FAAAA preemption by using its *ownership* of a facility to claim that it participated in markets operating *within* that facility. The Fifth Circuit has rejected that argument. App. 48a-49a.

Smith involved a dormant Commerce Clause challenge to rules adopted by Georgia's Department of Agriculture, which gave non-residents inferior sales locations in a farmers' market owned and operated by the State. 630 F.2d at 1082. The Fifth Circuit rejected the State's argument that it was acting as a market participant. The court noted that neither the State nor its Department of Agriculture "produce[d] the goods to be sold at the market" or "engage[d] in the actual buying or selling of those

goods." *Id.* at 1083. Instead, the State "has simply provided a suitable marketplace for the buying and selling of privately owned goods." *Ibid.* As a result, within that marketplace, the State's "essential role is that of market regulator" rather than a participant. *Ibid.*

Smith is binding precedent in the Eleventh Circuit under *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). Unsurprisingly, *Smith*'s approach has been applied by a district court in the Eleventh Circuit to a situation analogous to that presented here. In *Fla. Transp. Serv., Inc.* v. *Miami-Dade Cnty.*, 757 F. Supp. 2d 1260, 1281-1282 (S.D. Fla. 2010), the district court concluded that *Smith* precluded the Port of Miami from claiming it was a market participant, when the Port sought to impose conditions on the purchase and sale of stevedoring services while not itself purchasing or providing such services. The court held that "[t]he market participant doctrine does not help the County because the market for port services is distinct from the market for stevedore services. . . . Ownership of the Port does not make the County a participant in the stevedore market any more than ownership of the farmers' market made Georgia a participant in the produce market." *Id.* at 1282.

The Eighth Circuit, by contrast, has indicated its disagreement with *Smith*. According to the Eighth Circuit, when a municipal airport commission provides facilities for a car rental company, it is acting as a market participant. See *Four T's, Inc.* v. *Little Rock Municipal Airport Comm'n*, 108 F.3d 909, 912-913 (8th Cir. 1997). Thus, the Ninth Circuit's decision rejecting *Smith* exacerbates a preexisting conflict.

The Ninth Circuit's decision here additionally conflicts (as Judge Smith recognized in dissent) with the plurality opinion in *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82 (1984). The majority did not attempt to claim its position is consistent with *Wunnicke*, stating simply that *Wunnicke* is "not controlling" and is "a perfect example of the Supreme Court's fractured views on the market participant doctrine." App. 26a n.12.

In *Wunnicke*, this Court addressed the permissibility under the dormant Commerce Clause of a requirement imposed by Alaska conditioning the sale of timber on a contractual agreement that the timber be processed within the State before export. See 467 U.S. at 84. A four-Justice plurality of an eight-Justice Court rejected Alaska's claim that it was acting as a market participant. Reasoning that "the doctrine is not carte blanche to impose any conditions that the State has the economic power to dictate," *id.* at 97, the plurality concluded that "[t]he limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further," *ibid.* Justice Powell, joined by Chief Justice Burger, concurred in the judgment and suggested that this Court should have remanded rather than decided the market-participant issue. *Id.* at 101.

This Court and federal courts of appeals have followed the plurality opinion in *Wunnicke*.[5] Yet the

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[5] See, *e.g.*, *Dep't of Revenue of Kentucky* v. *Davis*, 553 U.S. 328, 348 n.17 (2008) (plurality opinion) ("[T]he type of 'downstream regulation' that *South–Central* found objectionable is simply not present here."); *United Healthcare Ins. Co.* v. *Davis*, 602 F.3d 618, 625 (5th Cir. 2010); *Brooks* v. *Vassar*, 462 F.3d 341, 356-357 (4th Cir. 2006); *Antilles Cement Corp.* v. *Acevedo Vilá*, 408 F.3d 41, 46-47 (1st Cir. 2005); *Endsley* v. *City of Chicago*, 230

Ninth Circuit felt free to contradict it. This Court should resolve the conflict.

2. Even if a State may properly claim that it acts as a market participant when imposing conditions on markets in which it does not participate, the Ninth Circuit's holding creates a circuit conflict. According to the decision below, a State acts as a market participant and escapes preemption when it pursues considerations entirely divorced from the efficient procurement of services. Other circuits disagree, even in the very FAAAA context in which this case arises. The limited case law of this Court recognizing such an exception to preemption under a different statute is also wholly at odds with the Ninth Circuit's approach.

Only a few circuits have recognized any market-participant exception to the FAAAA. All have done so in one highly specific factual circumstance. In *Cardinal Towing & Auto Repair, Inc.* v. *City of Bedford*, 180 F.3d 686 (5th Cir. 1999), a municipality decided that the non-consensual towing of vehicles from the public streets would be handled by contracting with a single company in lieu of the previous rotation system. A losing bidder asserted that the contracting ordinance was preempted by the FAAAA. *Id.* at 689. Disagreeing, the Fifth Circuit concluded that a city's contracting decision is shielded from preemption if it "applied to a single discre[te] contract" and was

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F.3d 276, 285 (7th Cir. 2000); *Huish Detergents, Inc.* v. *Warren Cnty., Ky.*, 214 F.3d 707, 716 (6th Cir. 2000); *Chance Mgmt., Inc.* v. *South Dakota*, 97 F.3d 1107, 1112 (8th Cir. 1996); *USA Recycling, Inc.* v. *Town of Babylon*, 66 F.3d 1272, 1282-1283 (2d Cir. 1995); *Atl. Coast Demolition & Recycling, Inc.* v. *Bd. of Chosen Freeholders*, 48 F.3d 701, 716 & n.19 (3d Cir. 1995); *GSW, Inc.* v. *Long County, Ga.*, 999 F.2d 1508, 1515-1516 (11th Cir. 1993).

"designed to insure efficient performance rather than advance abstract policy goals." *Id.* at 693. The court set out its test as follows (*ibid.*):

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary program?

In contrast to the panel decision here, the Fifth Circuit indicated that preemption would apply to a similar scheme that had been primarily motivated by "economics, community development, and social policies." According to the Fifth Circuit, "[w]hile private parties might choose to take into account such factors, the ever present temptation to leverage the spending power and thus intrude on congressional design is such that *the proprietary exception should be reserved for more archetypical market behavior.*" *Id.* at 693 n.2 (emphasis added).

The Fifth Circuit's precise, narrow conclusion—that municipal contracting with the providers of nonconsensual towing service was not preempted—was adopted by the Sixth and Ninth Circuits. *Petrey* v. *City of Toledo*, 246 F.3d 548, 559 (6th Cir. 2001) (noting challenged provisions serve City's "narrow proprietary interest" with respect to towing), *abrogated in part on other grounds by City of Columbus* v. *Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002); *Tocher* v. *City of Santa Ana*, 219 F.3d 1040, 1049-1050 (9th Cir. 2000), *abrogated in*

part on other grounds by City of Columbus, 536 U.S. 424. However, when a municipality attempted to extend the holding to consensual towing services (for which the municipality is *not* a party to the relevant transaction), the Fifth Circuit rejected the effort. In this context, the challenged provisions "frustrate the normal working of private decisionmaking in a market," and "the City's market power cannot be said to be typical of similar private actors." *Stucky* v. *City of San Antonio*, 260 F.3d 424, 436 (5th Cir. 2001), *abrogated in part on other grounds by City of Columbus*, 536 U.S. 424.[6]

Only once has this Court applied a market-participant exception to conclude that a state action was not preempted—and it did so in a case involving judicially created doctrines of implied preemption under the National Labor Relations Act (NLRA). *Bldg. & Construction Trades Council* v. *Assoc. Builders & Contractors* 507 U.S. 217, 232 (1993) ("*Boston Harbor*"). In doing so, the Court emphasized that the challenged governmental action (1) "was attempting to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost" and (2) "was specifically tailored to one particular job." *Ibid.* Here, the Ninth Circuit applied no

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[6] By applying a market-participant exception when the legislative purpose is not efficient procurement, the Ninth Circuit has also created conflicts with decisions outside of the FAAAA context. See *Tri-M Group, LLC* v. *Sharp*, 638 F.3d 406, 421-422 (3d Cir. 2011); *Healthcare Ass'n of New York State, Inc.* v. *Pataki*, 471 F.3d 87, 109 (2d Cir. 2006) (quoting approvingly Fifth Circuit's test in *Cardinal Towing*); *Council of City of New York* v. *Bloomberg*, 6 N.Y.3d 380, 395 (2006) ("In enacting the Equal Benefits Law the Council was obviously 'setting policy.' . . . [I]t was not acting just as a manager or owner of property concerned with assuring the cheap and efficient performance of contracts.").

such limitations on the market-participant exception to express FAAAA preemption.

The Court reinforced the limited scope of the NLRA's market-participant doctrine in *Chamber of Commerce* v. *Brown*, 554 U.S. 60 (2008). Holding a California law preempted by a 7-2 vote, the Court rejected a market-participant defense. The defense was unavailable because the legislative purpose was "not the efficient procurement of goods and services, but the furtherance of a labor policy," *id.* at 70. So too here.

Indeed, the United States, which submitted a brief in this case at the preliminary-injunction stage, termed the Port's market-participant argument "meritless." Brief for the United States as *Amicus Curiae* Supporting Reversal at 24, *Am. Trucking Ass'ns, Inc.* v. *City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009) (No. 08-56503) ("U.S. *Amicus* Br."). As the United States recognized, "[t]he Ports do not participate in any relevant market." *Id.* at 25. Instead, because the Port's "control over the channels of interstate commerce permits the State to erect substantial impediments to the free flow of commerce," the United States urged the court to reject the Port's market-participant argument. *Id.* at 25-26 (internal quotation marks omitted).

In this case, the majority acknowledged that the governmental requirement challenged is not a "narrow spending decision[]," App. 23a, nor does it reflect the Port's interest in "efficient procurement" of goods and services, *ibid.* Nevertheless, the panel concluded that the Port may, without preemption, impose conditions on a market in which it does not participate to ensure that services it does not purchase "are provided in a manner that is safe, reliable, and consis-

tent with the Port's overall goals for facilities management." App. 29a. No other court of appeals would have accepted that argument in the FAAAA context. The analogous argument has been consistently rejected—by this Court and others—outside the FAAAA context. Further review is appropriate.

B. The Questions Presented Are Significant and Recurring

As the many cases cited above demonstrate, the market-participant exception is frequently invoked in cases involving multiple statutes and the dormant Commerce Clause. It arises under the FAAAA and other statutes sharing similar express preemption language, and in cases involving implied field preemption (such as NLRA preemption). Thus, reviewing this case would bring clarity to a doctrine with potential application far beyond the particular context of this statute. At the same time, because this Court has never squarely addressed even the existence of a market-participant exception under an express preemption scheme, the context of this case represents an opportunity to define the particular limits applicable here.

Furthermore, the importance of uniformity to the deregulatory scheme set out by the FAAAA has repeatedly been recognized. As this Court noted in *Rowe*, the FAAAA's preemption clause was modeled on language in the ADA and reflected a congressional goal of "helping assure transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices,' as well as 'variety' and 'quality.'" 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 378). As with the ADA, "[i]n reducing federal economic regulation of the field to al-

low the forces of free competition to rule the marketplace, Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Found.* v. *Mass. Port Auth.*, 883 F.2d 157, 173 (1st Cir. 1989). Yet allowing the intercircuit differences discussed above to persist would lead to just that "patchwork of state service-determining laws, rules, and regulations" that this Court sought to avoid in *Rowe*. 552 U.S. at 373.

II. The Ninth Circuit Decision Also Expands and Entrenches a Circuit Split as to When a State Regulation Is "Related to a Price, Route, or Service"

The decision below reinforces the Ninth Circuit's cramped reading of "rates, routes, or services" under both the ADA and FAAAA. That reading has long conflicted with other circuits' position, as three Members of this Court recognized in *Northwest Airlines, Inc.* v. *Duncan*, 531 U.S. 1058 (2000) (dissent from denial of certiorari). In addition, the challenged governmental restrictions here *directly targeted* motor carriers. The panel's conclusion that such targeted restrictions are not preempted because they are insufficiently related to the "prices, routes, or services" of motor carriers flies in the face of the teaching of this Court and other circuits in related preemption settings.

A. This Case Creates a Conflict with Preemption Decisions Under Related Statutes

Relying on a Ninth Circuit precedent permitting a municipality to condition airline leases of airport facilities on compliance with a generally applicable city ordinance, the decision below created a conflict as

to when a state regulation has a "reference to carrier rates, routes, and services." The majority created that conflict by ignoring the specifically targeted nature of the restrictions at issue in this case. That omission contravenes the binding precedent of this Court in the analogous context of preemption under the Employee Retirement Income Security Act (ERISA) and the decisions of several circuits that have faithfully followed that mandate.

In the ERISA context, this Court has recognized the salience of the fact that a state law specifically targets the subject matter regulated by the preemptive federal statute. In *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988), the Court concluded that a state garnishment statute was preempted by ERISA, which displaces "any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a) (emphasis added). The state statute at issue, the Court noted, "expressly refers to—indeed, solely applies to—ERISA employee benefit plans." *Mackey*, 486 U.S. at 829. The Court had "virtually taken it for granted that state laws which are 'specifically designed to affect employee benefit plans' are pre-empted." *Ibid.* Later cases have only reinforced the importance of that distinction. *E.g.*, *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 139-140 (1990) ("We are not dealing here with a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan. . . . Here, the existence of a pension plan is a critical factor in establishing liability under the State's wrongful discharge law. As a result, this cause of action relates not merely to pension benefits, but to the essence of the pension *plan* itself.").

Numerous courts of appeals have analyzed in the ERISA context whether the challenged regulation is generally applicable or instead singles out the subject of the federal scheme for special treatment. See, *e.g.*, *Ky. Ass'n of Health Plans, Inc.* v. *Nichols*, 227 F.3d 352, 360 (6th Cir. 2000) ("While a mere reference to an ERISA plan, without more, may not be enough to cause preemption, . . . if such a reference is combined with some effect on those plans, such as singling them out for different treatment, preemption will result."), *aff'd sub nom. Ky. Ass'n of Health Plans, Inc.* v. *Miller*, 538 U.S. 329 (2003); *Greater Washington Bd. of Trade* v. *Dist. of Columbia*, 948 F.2d 1317, 1322 (D.C. Cir. 1991) ("[T]he '*Shaw* "exception"—that ERISA does not preempt state laws which affect benefit plans in a tenuous or peripheral manner—applies only to laws of general application; it does not protect state laws which specifically refer to ERISA benefit plans.'") (quoting *In re Dyke*, 943 F.2d 1435, 1448 (5th Cir. 1991)), *aff'd*, 506 U.S. 125 (1992). See also *Prudential Ins. Co. of Am.* v. *Nat'l Park Med. Ctr., Inc.*, 154 F.3d 812, 822 (8th Cir. 1998); *United Wire, Metal & Mach. Health & Welfare Fund* v. *Morristown Mem'l Hosp.*, 995 F.2d 1179, 1192 (3d Cir. 1993).

Courts of appeals have also recognized the salience of a law's general applicability outside the context of ERISA preemption. Applying the preemption provision of the ADA and conducting a field preemption analysis under the Federal Aviation Act of 1958, the Second Circuit in *Goodspeed Airport LLC* v. *E. Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, 212 (2d Cir. 2011), noted that "the generally applicable state laws and regulations imposing permit requirements on land use challenged here do not, on the facts before us, invade th[e]

preempted field [of aviation safety]." Applying the ADA in *Branche* v. *Airtran Airways, Inc.*, 342 F.3d 1248, 1258-1259 (11th Cir. 2003), the Eleventh Circuit held that "the phrase 'related to the . . . services of an air carrier' means having a connection with or reference to the elements of air travel that are bargained for by passengers with air carriers. . . . This connection can be established by showing that the state law in question either directly regulates such services or . . . has a significant economic impact on them."

The decision below conflicts with this long line of authority and with the common understanding that state laws targeting the very subject of a preemptive federal act—whether it be ERISA plans, the airline industry, or the trucking industry—are preempted. As this Court noted in *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 229 n.5 (1995), the expansive language of the ADA's preemption clause should be read in light of the statute's deregulatory purpose to indicate that "States may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier" (internal quotation marks omitted). The challenged provisions in this case do exactly that.

Indeed, the United States, in its earlier *amicus* brief, recognized that the concession agreements fall "squarely within the FAAAA's preemptive scope." U.S. *Amicus* Br. 7. As the United States noted (*id.* at 8-9):

> The concession agreements at issue here affect motor carriers' "price, route, or service" far more directly than the regulations on tobacco shippers at issue in *Rowe*. The concessions are essentially licenses to provide motor carrier

> services within the Ports. To enter the Ports—and thus to access any routes or provide any services to customers within the Ports—carriers must agree to comply fully with the multifarious requirements of the concession agreements.

Here, however, although petitioner raised the concession agreements' specific targeting of drayage service providers in its Ninth Circuit brief, the panel ignored the significance of targeting in concluding that "a State may condition access to State property so long as the conditions do not impose costs that *compel* the carrier to *change* rates, routes, or services." App. 21a (emphasis added). Applying that novel rule even to conditions targeting motor carriers conflicts with governing precedent of this Court.

B. This Case Entrenches a Conflict Regarding the Scope of the FAAAA's Preemption Clause

As far back as 2000, three Justices recognized a conflict among the courts of appeals regarding when a given restriction "relates to carrier rates, routes, or services." As Justice O'Connor recognized in dissenting from the denial of certiorari, the Ninth and Third Circuits define "services" narrowly for the purposes of preemption to include only "the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail." *Northwest Airlines*, 531 U.S. at 1058 (quoting *Duncan* v. *Northwest Airlines, Inc.*, 208 F.3d 1112, 1114 (9th Cir. 2000), and citing *Taj Mahal Travel, Inc.* v. *Delta Airlines, Inc.*, 164 F.3d 186 (3d Cir. 1998)). In sharp contrast, the Fourth, Fifth, and Seventh Circuits have all adopted a broader definition of "services," covering the "[contractual] features of air trans-

portation." *Ibid.* (alteration in original) (quoting *Hodges* v. *Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc), and citing *Smith* v. *Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998), and *Travel All Over The World, Inc.* v. *Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996)). The Eleventh Circuit later adopted this broader understanding as well. See *Branche*, 342 F.3d at 1257.

Since the conflict was first recognized, this Court decided *Rowe*. There, it made clear that "services" under the FAAAA must extend at least to such things as a carrier's (a) use of a recipient-verification system, see 552 U.S. at 368, 371-372, and (b) examination of a package to ensure that it is not being sent by a party listed as an unlicensed tobacco retailer, *id.* at 369, 372-373. Although the Court did not expressly resolve the circuit split, neither provision of the Maine law held preempted in *Rowe* fits comfortably within the Ninth Circuit's "public utility" understanding of the FAAAA's preemption clause. See *Air Transp. Ass'n of Am.* v. *City & Cnty. of San Francisco*, 266 F.3d 1064, 1071 (9th Cir. 2001). As a result, two circuits confronting this question after *Rowe* have adopted the broader approach first set out by the Fifth Circuit. *DiFiore* v. *Am. Airlines, Inc.*, 646 F.3d 81, 87-88 (1st Cir. 2011), *cert. denied*, No. 11-221 (Nov. 28, 2011); *Air Transp. Ass'n of Am.* v. *Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008). The First Circuit has correctly understood that the conflict "has been super[s]eded by controlling Supreme Court case law—namely, by *Rowe*'s expansive treatment of the term 'service.'" *DiFiore*, 646 F.3d at 88.

As this case demonstrates, however, the Ninth Circuit still clings to its narrow construction of the ADA's and FAAAA's preemption clauses. See App. 16a-17a; see also *Ginsberg* v. *Northwest, Inc.*, 653

F.3d 1033, 1041-1042 (9th Cir. 2011); *Ventress* v. *Japan Airlines*, 603 F.3d 676, 682-683 (9th Cir. 2010). The concession agreements imposed by the Port plainly regulate the contractual features of the provision of trucking services. Had the Ninth Circuit adopted other circuits' interpretation of "services" under the ADA and FAAAA, it would have been clear that a requirement directly targeting the provision of motor carrier services is subject to preemption under the FAAAA. The decision below should be reviewed (if not summarily reversed).

III. The Decision Below Conflicts with Controlling Precedent of This Court

Well before the passage of the FAAAA, this Court recognized limitations on the ability of States and municipalities to regulate federally licensed motor carriers. Even when regulating in an area of traditional state concern, a State is barred from enforcing its laws through even a partial suspension of the motor carrier's ability to operate in interstate commerce. The decision below rejects that limit—left unaltered by the passage of the FAAAA—in concluding that the Port can enforce a provision of the concession agreements by denying LMCs access to the Port of Los Angeles, thereby effecting a partial suspension of their federally granted licenses.

In *Castle* v. *Hayes Freight Lines, Inc.*, the Court addressed the scope of a State's "power . . . to bar interstate motor carriers from use of state roads as punishment for repeated violations of state highway regulations." 348 U.S. at 62. This Court noted that the adoption of the Motor Carrier Act of 1935 had greatly reduced States' former power over interstate motor carriers and that the Interstate Commerce Commission ("ICC") itself operated under specific

provisions governing the issuance and revocation or suspension of certificates. "Under these circumstances, it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate." *Id.* at 64. Since "[i]t cannot be doubted that suspension of this common carrier's right to use Illinois highways is the equivalent of a partial suspension of its federally granted certificate," the Court explained, a State may not enforce even an indisputably proper state regulation by resorting to such a penalty. *Ibid.*

Although the federal scheme regulating interstate motor carriers has changed since *Castle*, those changes have not altered this underlying limit on a State's regulatory authority. When Congress enacted the motor-vehicle-safety exception in the FAAAA's preemption clause, it acted against the backdrop of this settled law. It did not expand the regulatory authority of the States. See 49 U.S.C. § 14501(c)(2)(A) (noting the relevant preemption provision of the FAAAA "shall not restrict the safety regulatory authority of a State with respect to motor vehicles"). Indeed, just three days after the FAAAA's enactment, Congress enacted the Trucking Industry Regulatory Reform Act of 1994, reinforcing the ICC's authority to grant LMCs operating authority, while providing that the granted authority was now nationwide and not limited by a need to make a route-specific public interest finding. See Pub. L. No. 103-311, § 207 (1994), 108 Stat. 1683, 1686-1687. The 1995 ICC Termination Act, Pub. L. No. 104-88, provided for the retention of federal authority to license an interstate motor carrier's operations. See ICC Termination Act of 1995, Pub. L. No. 104–88, § 13902, 109 Stat. 803. Not one of those statutory amendments indicates an

intent to reverse the longstanding statutory interpretation regarding the limits on States' abilities to enforce vehicle-safety regulations.

The limits set out in *Castle*, and reaffirmed in cases such as *City of Chicago* v. *Atchison, Topeka & Santa Fe Ry.*, 357 U.S. 77 (1958), make clear that States and municipalities are prohibited from "exercising any veto power" over interstate motor carriers, *id.* at 85; see also *R.R. Transfer Serv. Inc.* v. *City of Chicago*, 386 U.S. 351, 359 (1967). In its *amicus* brief in the preliminary-injunction proceedings in this case, the United States made clear that, "[l]ike a federal system of comprehensive regulation, a federal system of broad deregulation is susceptible to disruption by state or local officials' attempts to 'exercise veto power' by imposing a licensing requirement to provide services." U.S. *Amicus* Br. 10.

The panel majority below purported to distinguish *Castle* on the ground that, "[u]nlike a ban on using all of a State's freeways, a limitation on access to a single Port does not prohibit motor carriers from participating in 'transport [of] interstate goods to and from that State' or eliminate 'connecting links to points in other states.'" App. 32a. The penalty, according to the panel, did not rise to the level of the "comprehensive ban" in *Castle*. Yet *Castle* does not apply solely to a "comprehensive ban" on an LMC's operations but extends to a "partial suspension of its federally granted certificate." 348 U.S. at 64. A motor carrier's federally granted interstate operating authority includes the transport of commodities between ocean ports and inland locations within the same state. See *Lodi Truck Serv., Inc.* v. *United States*, 706 F.2d 898, 899-900 (9th Cir. 1983). As a result, suspending these operators' ability to

transport commodities to or from the Port of Los Angeles operates as a partial suspension of the carriers' federal registrations. The decision below therefore conflicts with settled precedent of this Court in a respect critical to the efficient operation of the federal deregulatory scheme.

IV. The Decision Below Wrongly Answers Each of the Questions Presented

The decision below is deeply flawed at every turn. As an initial matter, the panel was wrong to reverse the Ninth Circuit's earlier conclusion that it "can hardly be doubted" that "the Concession agreements relate to prices, routes or services of motor carriers." App. 221a. The concession-agreement scheme imposed by the Port *directly targets* motor carriers. The panel was also wrong to suggest that the broad term "relate to" should be interpreted as covering only those state and local requirements that "compel changes to" prices, routes or services. Moreover, the authority claimed by the Port to prohibit motor carriers from entering its property and providing services represents "the very effect the federal law sought to avoid, *i.e.*, a State's direct substitution of its own governmental commands for 'competitive market forces' in determining (to a significant degree) the services that motor carriers will provide." *Rowe*, 552 U.S. at 365.

The Ninth Circuit similarly erred in concluding that any aspect of the challenged provision can be justified under a market-participant exception. The FAAAA nowhere expressly provides that Ports or any other governmental entities may enact otherwise-preempted regulations provided they do so while acting in a "proprietary capacity." That absence is telling since, under the ADA's materially identical

preemption scheme, Congress *did* provide exactly such an exception for municipally owned airports. See 49 U.S.C. § 41713(b)(3).

Congress likewise has elected to include market-participant exceptions (in a variety of forms) in a number of express preemption schemes, but not in others. Compare, *e.g.*, 15 U.S.C. § 2075(b) (allowing a federal, state, or local government to "establish[] or continu[e] in effect a safety requirement applicable to a consumer product for its own use which requirement is designed to protect against a risk of injury associated with the product and which is not identical to the consumer product safety standard applicable to the product under this chapter if the . . . requirement provides a higher degree of protection from such risk of injury"); 49 U.S.C. § 30103(b)(1) (allowing federal, state, or local government to "prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard"), with 49 U.S.C. § 14501(c)(2)(C) (providing, in the FAAAA's only provision even arguably recognizing an exception for state and local governments' proprietary interests, that the Act does not preempt laws "relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle"). There would be no need for Congress to include such provisions if the "market participant" exception could be read in by the courts. In addition, when Congress has elected to include such an exception in a preemption scheme, it ordinarily has limited it to the procurement activities of state or local governments (limits the Ninth Circuit in this case disregarded).

There is no textual basis for inferring, as the Ninth Circuit has, a market-participant exception to the broad terms of the FAAAA's preemption provision. The provision at issue here—a municipal ordinance backed by the threat of criminal prosecution requiring LMCs to enter into concession agreements to serve the Port—is a "law, regulation, or other provision having the force and effect of law." 49 U.S.C. § 14501(c)(1). That should be the end of the inquiry.

Boston Harbor is not to the contrary. That case did not deal with express preemption, but rather implied preemption. The same justification of adding a doctrine grounded in assumed congressional intent into the sphere of implied preemption under the NLRA is wholly lacking where, as in this case, Congress has expressly set out the scope of preemption.

Moreover, in *Boston Harbor* this Court relied on the fact that exempting a government's truly proprietary actions would serve the goals of the NLRA, because that statute included an exception for the construction industry specifically authorizing the use of pre-hire agreements of the very kind required by the government as the purchaser of services. See 507 U.S. at 231. The FAAAA, by contrast, provides no exceptions for private or public parties to create restrictions of the sort instituted by the Port here. Indeed, the FAAAA categorically bars a State from "requir[ing] a motor carrier . . . to display any form of identification on or in a commercial motor vehicle . . . other than forms of identification required by the Secretary of Transportation" (49 U.S.C. § 14506(a)). In light of that proscription, it is difficult to see why a State or municipality should be entitled (as the Ninth Circuit held) to impose exactly such a requirement

merely because it purports to act as a market participant.

The Fourth Circuit has confronted a similar situation in which a municipal port sought to bar access to federally licensed fishermen. Facing a preemption challenge under the Magnuson Act, the port invoked what it termed a "proprietary capacity exception." The Fourth Circuit refused to read such an exception into the statute, concluding that there is "no explicit provision creating a proprietary exception[,] . . . [n]or does the City point to any basis for concluding that such an exception is implied." *City of Charleston* v. *A Fisherman's Best, Inc.*, 310 F.3d 155, 178-179 (4th Cir. 2002).

Even if such an exception could properly be inferred by the courts, the breadth of the exception recognized here threatens to swallow the FAAAA's general preemption rule. The restrictions imposed by the Port here are unconnected with any interest in specifying what service it is procuring or "ensur[ing] that [its] funds are spent in accordance with the purposes for which they are appropriated." *Chamber of Commerce*, 554 U.S. at 70. Instead, the Port, as the panel acknowledged, neither provides nor procures any drayage services. App. 27a-28a. The Port's "participation" in the market is as a regulator only.

Nor is this all. The panel majority justified use of the market-participant exception on the sweeping ground that the Port's actions were undertaken to "[e]nhanc[e] good-will in the community surrounding the Port," App. 40a, or to "receiv[e] complaints about drayage trucks entering, leaving, and operating on its property," App. 46a. To allow a governmental actor to pursue actions simply because they "enhance goodwill in the community" is to recognize a market-par-

ticipant exception that swallows the general rule of preemption.

Finally, as noted above, the panel opinion is inconsistent with this Court's decision in *Castle*. While Congress in enacting the FAAAA did preserve the "safety regulatory authority of a State with respect to motor vehicles," 49 U.S.C. § 14501(a)(2), neither the FAAAA nor any later statute indicated that the authority preserved was unconstrained by long-recognized limits on remedial authority. Instead, as the United States argued in the preliminary-injunction proceedings, "[l]ike a federal system of comprehensive regulation, a federal system of broad deregulation is susceptible to disruption by state or local officials' attempts to 'exercise veto power' by imposing a licensing requirement to provide services." U.S. *Amicus* Br. 10. Moreover, as in *Castle* itself, there is no indication that the "conventional forms of punishment are inadequate" to enforce any safety regulations imposed by the Port. See *Castle*, 348 U.S. at 64.

The panel in this case did not directly conclude that *Castle* has been modified or overturned by later developments. Instead, it purported to distinguish the decision on the ground that denial of access to a Port is not the equivalent of a "comprehensive ban." App. 32a. But that rationale is untenable. The Port of Los Angeles "handles more shipping container and cargo volume than any other port in the country." App. 6a. Preventing federally licensed motor carriers from accessing this Port undeniably precludes them from engaging in the interstate transport of goods entering the United States through the Port and destined to customers both within and outside the State of California. The Port's actions thus plainly

serve as a partial suspension of these carriers' operating authorities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 22, 2011

APPENDIX

APPENDIX A

United States Court of Appeals,
Ninth Circuit.

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Plaintiff–Appellant,

v.

The CITY OF LOS ANGELES; the Harbor Department of the City of Los Angeles; the Board of Harbor Commissioners of the City of Los Angeles,
Defendants–Appellees,
Natural Resources Defense Council; Sierra Club; Coalition for Clean Air, Inc., Defendants–intervenors–Appellees.

No. 10–56465.

Argued and Submitted June 10, 2011.
Filed Sept. 26, 2011. Amended Oct. 31, 2011.

Counsel

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Appeal from the United States District Court for the Central District of California, Christina A. Snyder, District Judge, Presiding. D.C. No. 2:08–cv–04920–CAS–CT.

Before: BETTY B. FLETCHER and N. RANDY SMITH, Circuit Judges, and RUDI M. BREWSTER, District Court Judge.*

Opinion

Opinion by Judge B. FLETCHER; Dissent by Judge N.R. SMITH.

ORDER

The majority opinion filed September 26, 2011, slip op. 18193, is hereby amended as follows:

1. Lines 20-25 at slip op. 18208 are deleted and the following are substituted in their stead: "The district court's factual determinations are reviewed for clear error, and may be reversed only if they are "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Hinkson*, 585 F.3d at 1251."

OPINION

B. FLETCHER, Circuit Judge:

Beginning in 2008, the Port of Los Angeles (POLA, or the Port) prohibited motor carriers from operating

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* The Honorable Rudi M. Brewster, Senior District Court Judge for the U.S. District Court for Southern California, San Diego, sitting by designation.

drayage trucks[1] on Port property unless the motor carriers entered into "concession agreements" with the Port. The concession agreements set forth fourteen specific requirements covering, among other things, truck driver employment, truck maintenance, parking, and Port security. The agreements were adopted as part of the Port's "Clean Truck Program" (CTP), which includes a progressive ban on older (and higher-polluting) trucks on Port property, a multi-faceted incentive program to support acquisition of clean trucks, and a system of penalties on transport of cargo by older trucks. The Port adopted the CTP in response to community opposition, including litigation, that had successfully stymied Port growth from the mid–1990s through 2007.

American Trucking Associations, Inc. (ATA, a national association of motor carriers),[2] challenges the concession agreements, arguing that they are preempted by the Federal Aviation Administration Authorization Act (FAAA Act), 49 U.S.C. § 14501 et seq. After obtaining a preliminary injunction against several provisions of the concession agreements, ATA challenged five specific provisions at trial. The district court held that none of the challenged provisions fell within the scope of FAAA Act preemption, first because some did not relate to motor carriers' rates, routes, and services, and

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[1] Drayage trucks move cargo from marine terminals at the Port (where shipping companies unload containers) to customers, railroads, or other trucks for long-distance transport.

[2] Approximately thirty of the six hundred motor carriers currently operating at the Port are members of ATA.

second because the State adopted the entire agreement (and the challenged provisions in particular) in its capacity as a market participant, rather than a market regulator. *See* 49 U.S.C. § 14501(c)(1). The district court further held that the FAAA Act's exemption for regulation "genuinely responsive to motor vehicle safety" saved from preemption the provision requiring motor carriers to create and administer regular maintenance plans. *See* 49 U.S.C. § 14501(c)(2)(A).

ATA appeals. We have jurisdiction under 28 U.S.C. § 1291. We affirm the district court in large part, but reverse its decision that the employee-driver provision of the concession agreement falls within the market participant doctrine and is not preempted.

I.

A.

The Port of Los Angeles is an independent division of the City of Los Angeles, managed by the Board of Harbor Commissioners (BHC or the Board). It "occup[ies] land that was granted by the State of California ... via the California Tidelands Act, and the Port[ ] hold[s] the land in trust for the benefit of the people of California." *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1048–49 (9th Cir. 2009) (*ATA–II*). The Port is not, however, taxpayer-supported; it depends entirely on property leases and fees for its revenue, and manages its funds independent of the City. The Port develops terminal facilities and then leases those facilities to shipping

lines and stevedoring companies.[3] It handles more shipping container and cargo volume than any other port in the country, and competes with other ports for business.

Terminal operators unload cargo from ships docked at the Port into marine terminals. From the marine terminals, drayage trucks transport cargo to customers (or to off-Port long-distance trucks or railroads for further transport). "A supply of drayage trucks and drivers is integral to cargo movement at the Port." Cargo owners, ocean carriers, railroads, and other transportation providers arrange for drayage services through Licensed Motor Carriers (LMCs or motor carriers). Prior to 2008, most LMCs serving the Port did not own or operate drayage trucks; rather LMCs contracted with independent owners and operators of trucks to actually provide the drayage services. The Port does not directly contract for any drayage services.

Around 1997, the Port developed plans to expand its cargo terminal facilities in order to accommodate more (and larger) ships. *See Natural Res. Def. Council, Inc. v. City of L.A.*, 103 Cal. App. 4th 268, 126 Cal. Rptr. 2d 615, 618 (2002). Those plans have been stymied by legal opposition from community and environmental groups, which claimed that the Port's expansion would increase air pollution, that such pollution would adversely effect the health of people in the surrounding communities,[4] and that

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[3] Stevedores manage the loading and unloading of ships. *Black's Law Dictionary* 1539 (9th ed.2009).

[4] The Port is located in California's South Coast Air Basin, an EPA non-attainment area for several air quality standards. In

the Port did not comply with environmental laws in planning its expansion. *Id.* In 2002, a California appellate court enjoined construction of a new terminal facility for the China Shipping Line Company, concluding that the Port had failed to comply with the requirements of the California Environmental Quality Act. *Id.* at 628. The Port settled that suit in 2003 for more than $80 million. Similarly, in 2007, environmental and community groups threatened to seek an injunction of the Port's plan to expand its TraPac Terminal. The Port entered into a settlement agreement in April 2008, requiring it to establish a five-year community mitigation plan to offset the environmental impact of the proposed expansion.

In response to the opposition to Port expansion, the Boards of Harbor Commissioners for Los Angeles and Long Beach adopted a Clear Air Action Plan (CAAP) in November 2006.[5] In the CAAP, the Port announced its intention to "grow green" and achieve a 45% reduction in total emissions by 2012. The Ports stated that they "recognize that their ability to

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2008, the Basin had the worst air quality in the nation for a number of pollutants. The Port is responsible for a significant portion of these pollutants. In 2008, the population residing in the area around the Port suffered an average cancer risk from air pollution more than 60% higher than the average in the South Coast Air Basin.

[5] The Ports of Los Angeles and Long Beach are contiguous and form a single physical Port, although they are managed independently. Though the Port of Long Beach was originally a party to this lawsuit, the Port of Long Beach and Appellees settled in October 2009, and the district court dismissed the Long Beach defendants with prejudice. The Long Beach claims are not at issue in this case.

accommodate the projected growth in trade will depend upon their ability to address adverse environmental impacts ... that result from such trade."

Recognizing that trucks are a major source of air pollution at the Port, the CAAP introduced the Clean Truck Program, which was "designed to reduce emissions from the heavy duty trucks involved in port drayage to improve the health of people living in the communities surrounding the [Port]." The CAAP directed Port staff to "undertake a 5–year, focused effort to replace or retrofit the entire fleet of over 16,000 trucks that regularly serve our Port...." From November 2006 through February 2008, the Ports worked to develop the Clean Truck program. The Ports held a number of public meetings, consulted with stakeholders, and hired consultants to evaluate ideas for implementation.

In October 2007, the Port adopted the first part of its Clean Truck Program: a progressive ban on older, higher-polluting trucks, with the goal that by 2012 all trucks visiting the Port frequently or semi-frequently will meet the United States Environmental Protection Agency's 2007 emissions standards. The ban forbids terminal operators to allow non-compliant trucks to enter Port property. In December 2007, the Port also implemented a Clean Truck Fee, which functions as a penalty to incentivize rapid replacement of older trucks. The fee is charged to terminal operators, not to motor carriers, and applies to every container transported during the transition period by a drayage truck not in compliance with 2012 emissions goals. Neither the

progressive ban nor the Clean Truck Fee are directly at issue in this appeal.

During its design of the Clean Truck Program, the Port identified several dilemmas it believed it needed to address. The Port believed that it would be very difficult for drayage service providers to comply with the progressive ban, particularly in light of research showing that drayage service providers had low capital and limited opportunities to obtain credit to invest in the acquisition of new trucks. Accordingly, the Port recognized that it would need to provide substantial financial grants to support the Clean Truck Program. The Port also wanted to "ensure that the Clean Trucks Program funding system yields more than temporary benefits." The Port was especially concerned with ensuring that trucks purchased or retrofitted using State funding were maintained to ensure environmental compliance and safety. This concern stemmed from the Port's belief that independent owner-operators had little capital to invest in maintaining cleaner trucks and that current mechanisms were inadequate to ensure maintenance on each individual truck.

The Port was also concerned that the Clean Truck Program, in combination with the Transportation Worker Identification Credential (TWIC) program,[6]

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[6] The Transportation Worker Identification Credential (TWIC) is a "security measure that will ensure individuals who pose a threat do not gain unescorted access to secure areas of the nation's maritime transportation system." *See* Transportation Security Administration, TWIC Program Information, available at http://www.tsa.gov/what_we_do/layers/twic/program_info.shtm.

would result in significant losses of drayage truck drivers and disruption of Port services. After engaging in extensive study of Port drayage, the Port estimated that approximately 16,800 trucks would need to be replaced or retrofitted, and that an additional 6,000 to 13,000 trucks would be necessary to maintain drayage services when the Port expanded. The Port suspected that the Clean Truck Program would be prohibitively expensive for independent owner operators and could result in a significant disruption in drayage services. It also believed that 10 to 20% of extant drayage truck drivers would be unable to comply with TWIC requirements and thus unable to continue with port drayage. Left unaddressed, the Port concluded, these dilemmas could result in a crisis.

To address its concerns, the Port decided to implement concession agreements as part of the Clean Truck Program. It hired consultants to examine whether proposed concession agreements would further the Port's economic, operational, and safety goals. Some of the major issues the consultants considered were: (1) whether to provide incentives only to licensed motor carriers, or to all independent owner operators; (2) whether to require operational criteria to provide oversight of drayage truck operations; (3) and whether to require licensed motor carriers to convert to an "employee-only" model as opposed to using independent owner-operators.

Ultimately, the consultants reached similar conclusions. Each report recognized that stringent operational criteria and the adoption of an employee-

only model for motor carriers would result in significant economic hardship for drayage truck providers, likely putting many of the more economically-marginalized companies out of business. Yet, each recommended that converting to such a model would have greater long-term benefits and provide the Port with the "best guarantee" of long-term sustainability in port drayage.

In March 2008, the Port approved a multi-faceted incentive program and a concession agreement system. The incentive program was designed to "encourage Licensed Motor Carriers to cooperate" with the progressive ban. These programs included the Truck Funding Program, which offers grants covering 80% of the cost of obtaining a new, compliant truck or 100% of the costs of retrofitting older trucks, and a lease-to-own program with financial institutions selected by the Port and financial assistance towards the purchase of trucks at the end of the lease term; a Scrap Truck Buyback program, which provides a $5,000 bonus incentive for scrapping pre–1989 drayage trucks; a Procurement Assistance Program to help smaller motor carriers obtain better terms on new truck purchases; and a Concession Business Outreach Program. Though other incentives are available to any owner of qualifying trucks, the Truck Funding Program is available only to licensed motor carriers who are "concessionaires" in good standing with the Port, and funding priority is given to "concessionaires with a history of port drayage and financing." The funding is not available to independent owner-operators. In addition, concessionaires receiving funding must "commit to a minimum Port drayage frequency for

each new truck of a minimum average of six trips per week for five years." The incentive programs are not directly at issue in this appeal.

Finally, the Board issued an order approving concession agreements and providing that, effective October 1, 2008, "no Terminal Operator shall permit access into any Terminal in the Port of Los Angeles to any Drayage Truck unless such Drayage Truck is registered under a Concession or a Day Pass from the Port of Los Angeles." The concession plans created a direct contractual agreement between the Port and motor carriers providing drayage services.

Five provisions of the concession agreements are at issue in this appeal:

1. Provision III(d) requires concessionaires to transition over five years to using 100% employee drivers rather than using independent owner-operators. (The employee-driver provision).

2. Provision III(f) requires concessionaires to submit for approval "an off-street parking plan that includes off-street parking locations for all Permitted Trucks" and requires concessionaires to ensure that Permitted Trucks are "in compliance with parking restrictions by local municipalities." (The off-street parking provision).

3. Provision III(g) makes concessionaires "responsible for vehicle condition and safety" and requires them to "ensure that the maintenance of all Permitted Trucks ... is conducted in accordance with manufacturer's instructions." (The maintenance provision).

4. Provision III(l) requires concessionaires to "post placards on all Permitted Trucks" when the trucks are "entering and leaving Port Property and while on Port Property." The placards shall "refer[ ] members of the public to a phone number to report concerns regarding truck emissions, safety, and compliance to the Concession Administrator and/or authorities." (The placard provision).

5. Provision III(n) requires a concessionaire to "demonstrate[ ] to the satisfaction of the Executive Director that it possesses the financial capability to perform its obligations under th[e] Concession [agreement]." (The financial capability provision).

Each concessionaire also agreed to pay a one-time concession fee of $2,500, and an annual fee of $100 for each permitted truck. As of April 2010, approximately 600 motor carriers had signed concession agreements with the Port.

B.

The procedural history of this case is extensive; we commend the reader to the orders and opinions discussing ATA's quest for a preliminary injunction.[7]

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[7] *See Am. Trucking Ass'ns, Inc. v. City of L.A.*, 577 F. Supp. 2d 1110 (C.D. Cal. 2008) (*ATA–I*) (denying preliminary injunction on the grounds that the safety exception applies); *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046 (9th Cir. 2009) (*ATA–II*) (reversing the safety exception decision and remanding); *Am. Trucking Ass'ns, Inc. v. City L.A.*, No. CV 08–4920, 2009 WL 1160212 (C.D. Cal. Apr. 28, 2009) (*ATA–III*); *Am. Trucking*

Suffice it to say that ATA was initially denied a preliminary injunction in full and this court reversed. *See generally Am. Trucking Ass'ns, Inc. v. City of L.A.*, 577 F. Supp. 2d 1110 (C.D. Cal. 2008) (*ATA–I*) (holding that the market participant doctrine did not apply but denying preliminary injunction on the grounds that the safety exception applies); *ATA–II*, 559 F.3d 1046 (reversing the safety exception decision and remanding). On remand, the district court granted a preliminary injunction against the employee driver provision, the parking provision, and the financial capability provision, but not the maintenance and placard provisions. *See generally Am. Trucking Ass'ns, Inc. v. City of L.A.*, No. CV 08–4920, 2009 WL 1160212 (C.D. Cal. Apr. 28, 2009) (*ATA–III*). ATA again appealed. We reversed only with respect to the placard provision. *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 596 F.3d 602 (9th Cir. 2010) (*ATA–IV*). All told, the maintenance and placard provisions have been operative since April 2009, but the employee driver, parking, and financial capability provisions have not. After a bench trial on the merits, the district court made 105 specific findings of fact, and concluded that none of the challenged provisions were preempted. ATA appeals.

Ass'ns, Inc. v. City of L.A., 596 F.3d 602 (9th Cir. 2010) (*ATA–IV*).

II.

We review a district court's decision regarding federal preemption de novo. *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1045 (9th Cir. 2000), *abrogated on other grounds by City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 428 (2002), *and Tillison v. City of San Diego*, 406 F.3d 1126 (9th Cir. 2005); *see also United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc) (If a " 'question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, ... the question should be classified as one of law and reviewed de novo.' ") (quoting *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir. 1984)).

The district court's factual determinations are reviewed for clear error, and may be reversed only if they are "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Hinkson*, 585 F.3d at 1251.

III.

We first discuss the law relevant to this appeal, and address ATA's contentions that the district court misinterpreted the applicable law. We do not, in this section, address ATA's contentions that the district court misapplied the law to the facts. We will apply the law to the facts in section V of this opinion.

Congress enacted the FAAA Act in 1994 to prevent States from undermining federal deregulation of interstate trucking. *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008); *Tocher*, 219 F.3d at

1048. The FAAA Act provides as a "general rule" that "a State[or] political subdivision of a State ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... with respect to the transportation of property." 49 U.S.C. § 14501(c)(1).

In determining whether § 14501(c)(1) of the FAAA Act preempts State action, we ask three questions. First, we must consider whether the provision "relate [s] to a price, route, or service of a motor carrier." *Id.*; *see also Rowe*, 552 U.S. at 368. If the answer is no, the provision does not fall within the preemptive scope of § 14501(c)(1). If the answer is yes, we must consider whether the provision "has the force and effect of law"—that is, whether the provision was enacted pursuant to the State's regulation of the market, rather than the State's participation in the market in a proprietary capacity. 49 U.S.C. § 14501(c)(1); *see also Tocher*, 219 F.3d at 1049–50. If the provision does not fall within the market participant doctrine and relates to rates, routes, or services, we turn to the third inquiry and consider whether any of the FAAA Act's express exemptions save the regulation from preemption. As relevant here, the FAAA Act does not "restrict the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A); *see also City of Columbus*, 536 U.S. at 428.

ATA argues that the district court misidentified and misapplied the law at every step. We first consider each of ATA's general challenges to the district court's analysis. We reject ATA's arguments that (1)

the concession agreements per se affect rates, routes, and services; (2) the market participant doctrine does not apply because the Port does not "procure" drayage services; and (3) that the Supreme Court's decision in *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954) precludes the application of the safety exception to this case.

A. Related to Rates, Routes, or Services

"[S]tate enforcement actions having a connection with, or reference to [motor] carrier rates, routes, and services are preempted." *Rowe*, 552 U.S. at 370–371 (internal quotation marks and emphasis omitted) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 386–84, 390 (1992)) (interpreting the nearly identical preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1305(a)(1)). The terms "rates, routes, and services" were "used by Congress in the public utility sense; that is, service refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided.... Rates indicates price; routes refers to courses of travel."[8] *Air Transport Ass'n of Am. v. City & Cnty. of San Francisco*, 266 F.3d 1064, 1071 (9th Cir. 2001) (internal quotation

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[8] The Airline Deregulation Act preempts any provision that relates to "*rates*, routes and services." 49 U.S.C. app. § 1305(a)(1) (emphasis added). The FAAA Act preempts any provision that relates to "*prices*, routes, and services." 49 U.S.C. § 14501(c)(1). We use the terms "prices" and "rates" interchangeably. *See Rowe*, 552 U.S. at 375, 128 S. Ct. 989 (discussing whether a state provision relates to *rates* and is preempted under the FAAA Act).

marks, citations, and alterations omitted); *see also Rowe*, 552 U.S. at 372–73 (describing a motor carrier's services as its system for picking up, sorting, and carrying goods).

In determining whether a provision has a connection to rates, routes, or services, we must examine the actual or likely effect of a State's action. *Cf. Cal. Div. of Labor Standards Enforcement v. Dillingham Constr. NA, Inc.*, 519 U.S. 316, 325 (1997); *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998). If the State, for example, mandates that motor carriers provide a particular service to customers, or forbids them to serve certain potential customers, the effect is clear, and the provision is preempted if it has the force and effect of law. *See Rowe*, 552 U.S. at 372–73; *Morales*, 504 U.S. at 388–89 (noting that advertising guidelines expressly referenced rates and had a forbidden significant effect on the fares charged). The waters are murkier, though, when a State does not directly regulate (or even specifically reference) rates, routes, or services. We recognize that FAAA Act "pre-emption may occur even if a [S]tate law's effect on rates, routes, and services 'is only indirect.'" *Rowe*, 552 U.S. at 370 (quoting *Morales*, 504 U.S. at 386). At the same time, we require that the effect on rates, routes or services be more than "tenuous" or "remote." *Id.* at 371 (quoting *Morales*, 504 U.S. at 390).

In such a "borderline" case, the proper inquiry is whether the provision, directly or indirectly, "binds the ... carrier to a particular price, route or service and thereby interferes with competitive market

forces within the ... industry." *Air Transport*, 266 F.3d at 1072; *cf. Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 232–33 (1995) (holding that the Airline Deregulation Act's preemption clause "stops States from imposing their own substantive standards with respect to rates, routes, or services" but does not prevent States from enforcing dispute resolution provisions in contracts signed by airlines); *Mendonca*, 152 F.3d at 1189 (holding that a State minimum wage statute did not affect rates, routes or services). ATA argues that the district court erred in examining the effect of each individual provision of the concession agreements, contending that "the requirement of a concession agreement per se affects routes and services" because it provides "POLA [the] ability to prohibit non-concessionaire LMCs from entering its property."

Our decision in *Air Transport* forecloses ATA's argument. 266 F.3d at 1071–72. *Air Transport* considered whether a city ordinance requiring that registered domestic partners be afforded treatment equal to spouses had an effect on the routes of airlines.[9] *Id.* at 1069. The Airlines contended that

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[9] ATA argues that the concession agreements differ from the ordinance at issue in *Air Transport* because the latter did "not give the city discretion to decide which airlines could not serve the airport." ATA misreads *Air Transport*. The ordinance there said "[n]o contracting agency of the City ... shall execute or amend any contract ... with any contractor that discriminates in the provision of [benefits] ... between employees with domestic partners and employees with spouses...." 266 F.3d at 1069. The ordinance required the airport to establish that the airlines did not discriminate, and prohibited the airport from contracting with airlines that did, or executing pre-existing contracts. There is no meaningful distinction between the ordinance in *Air*

the ordinance would require them to raise their rates or cease operating at San Francisco Airport due to increased costs. *Id.* at 1072, 1074. We held that because "[t]he Airlines [conceded] that they will use airport property in San Francisco regardless of the Ordinance ..., the Ordinance cannot be said to compel or bind the Airlines to a particular route or service and there is no preemption under the connection-with test." *Id.* at 1074. The Airlines claimed that the ordinance presented a "Hobson's choice—either leave the Airport or do not discriminate." *Id.* We noted that air carriers were allowed "to make their own decisions about where to fly and how many resources to devote to each route and service." *Id.* Though the Airlines' decision to operate in San Francisco "may mean the Airlines will have to agree to abide by the Ordinance's non-discrimination requirements as a 'cost' of maintaining their leases at [San Francisco Airport]," that did not, in itself, mean the Ordinance was preempted. *Id.* "Hypothetically, there might be some contract term the City could demand whose costs would be so high that it would compel the Airlines to change their prices, routes, or services," but the San Francisco Ordinance "d[id] not approach that level." *Id.* at 1075 (*citing N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) for the proposition that "there may be a point at which costs from a [S]tate law are so exorbitant that it could rise to the level of a substantive mandate.").

Transport and the concession agreements, which also require the Port to ensure that concessionaires comply with certain requirements before entering Port property.

Air Transport establishes that a State may condition access to State property so long as the conditions do not impose costs that compel the carrier to change rates, routes, or services (for example by forcing the carrier to cease doing business with the State). Accordingly, the concession agreements do not *necessarily* affect rates, routes, or services simply because they impose conditions on entering Port property. The correct question is whether each condition binds motor carriers, directly or indirectly, to a particular rate, route, or service. We apply this law to specific provisions of POLA's concession agreements in part V of this opinion.

B. The Market Participant Doctrine

The FAAA Act "preempt[s] only [S]tate regulation, and not actions a [S]tate takes as a market participant." *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1022 (9th Cir. 2010); *Tocher*, 219 F.3d at 1049. In applying the market participant doctrine, we undertake "a single inquiry: whether the challenged program constitute[s] direct [S]tate participation in the market." *Reeves, Inc. v. Stake*, 447 U.S. 429, 435 n. 7 (1980) (internal quotation marks omitted); *see also Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.* (hereinafter *Boston Harbor*), 507 U.S. 218, 227–32 (1993) (considering whether the State was pursuing "proprietary interests").

ATA contends that the Port does not participate in the market because the concession agreements do not fall neatly within the two-prong test adopted by our circuit as a guide for determining whether the

market participant doctrine applies. *Johnson*, 623 F.3d at 1023–24. The test was first developed in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999), and asks:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?

Id.; *see also Chamber of Commerce v. Lockyer*, 463 F.3d 1076, 1084 (9th Cir. 2006) (en banc), *rev'd on other grounds sub nom., Chamber of Commerce v. Brown*, 554 U.S. 60 (2008) *and vacated by* 543 F.3d 1117 (9th Cir. 2008). The first question "looks to the *nature* of the expenditure and protects comprehensive [S]tate policies with wide application from preemption, so long as the type of [S]tate action is essentially proprietary." *Johnson*, 623 F.3d at 1024 (internal quotation marks omitted) (quoting *Lockyer*, 463 F.3d at 1084). "The second question looks to the *scope* of the expenditure and protects narrow spending decisions that do not necessarily reflect a [S]tate's interest in the efficient procurement of goods or services, but that also lack the effect of broader social regulation." *Id.* (internal quotation marks omitted) (quoting *Lockyer*, 463 F.3d at 1084). If the answer to *either* question is yes, the market participant exception applies. *Id.*

The second prong of the *Cardinal Towing* test is not at issue here. The concession agreements are not "narrow spending decisions" that "lack the effect of broader social regulation." *Johnson*, 623 F.3d at 1024 (quoting *Lockyer*, 463 F.3d at 1084) (internal quotation marks omitted). "Narrow spending decisions" tend to be expressly limited in time and scope—for example, they apply to one city contract or to a number of contracts of a particular size and funded by a particular finite source. *See id.* at 1028–29 (agreement limited to construction projects costing over $200,000, in a three-year period, and funded by specific initiative); *Sprint Spectrum LP v. Mills*, 283 F.3d 404, 421–21 (2d Cir. 2002) (contract applied only to one cellular phone tower located on particular property); *Cardinal Towing*, 180 F.3d at 694 (restrictions applied to single contract for police tows). Here, the concession agreements are not limited to contracts of a particular size or subsidized by State funds, and are not limited to drayage operations for a particular time. These factors indicate that the concession agreements do not fall within the narrow scope prong.

Thus, we must consider whether the nature of the concession agreements is essentially proprietary. *Johnson*, 623 F.3d at 1024. ATA contends if the State's actions do not qualify as "efficient procurement," they cannot be considered proprietary.[10] We disagree.

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[10] Contrary to ATA's assertion, neither the district court's decision at the preliminary injunction phase nor this court's affirmance of that decision are binding as law of the case. The district court concluded that "[a]lthough case law provides some

The Supreme Court has applied the market participant doctrine to a case not involving "procurement" of goods. In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 796–97 (1976), the Supreme Court upheld a Maryland policy penalizing in-state wreckers who kept abandoned vehicles on their property, and offering bounties to processors who scrapped vehicles formerly titled in Maryland. The Court held that Maryland's "payment of [S]tate funds—in the form of bounties—to encourage the removal of automobile hulks" was proprietary and did not violate the dormant commerce clause. *Id.* at 809. It stated that vehicles "remain within Maryland in response to market forces, including that exerted by money from the State." *Id.* at 810. Under *Alexandria Scrap*, procurement for governmental use is not the only way a State can participate in the market.

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conflicting indications, the Court finds that, on balance, plaintiff has a significant likelihood of showing that defendants are not participants in the relevant market." *ATA–I*, 577 F. Supp. 2d at 1120. We commended the district court's "cogent explanation" but offered no further analysis. *ATA–II*, 559 F.3d at 1053.

As a "general rule, our decisions at the preliminary injunction phase do not constitute the law of the case." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA*, 499 F.3d 1108, 1114 (9th Cir. 2007) (internal quotation marks and citation omitted). "Any of our conclusions on pure issues of law, however, are binding." *Id.* Neither *ATA–I* nor *ATA–II* decided a "pure issue of law" with respect to the market participant doctrine, and their equivocal holdings on the *likelihood* that plaintiffs would prevail are not binding on this panel.

The first prong of *Cardinal Towing* is useful in cases where the government is buying goods or seeking services,[11] but it is not the be-all-and-end-all of proprietary action. *Cardinal Towing* acknowledged as much, noting that its questions "seek to isolate" those cases to which the market participant doctrine applies and help courts to "distinguish[ ] between proprietary action that is immune from preemption and impermissible attempts to regulate through the spending power." 180 F.3d at 693. If the State is not engaged in "efficient procurement" but nonetheless directly participates in the market in a proprietary manner, we see no reason why *Cardinal Towing* should preclude the application of the market participant doctrine. *Cf. Tri–M Group, LLC v. Sharp*, 638 F.3d 406, 422 (3d Cir. 2011) (identifying "several questions a court should ask when conducting the 'single inquiry' to determine 'whether the challenged program constitute[s] direct state participation in the market' " and emphasizing that the questions must be considered in the "specific context" presented) (quoting *White v. Mass. Council of Constr. Emp'rs Inc.*, 460 U.S. 204, 208 (1983)).

Here, the Port directly participates in the market as a manager of Port facilities. In essence, the concession agreements are contracts under which the Port exchanges access to its property for a drayage carrier's compliance with certain conditions. ATA contends that the Port's participation in the "port

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[11] *See, e.g., Engine Mfrs. Ass'n v. S. Coast Air Quality Maint. Dist.*, 498 F.3d 1031, 1040 (9th Cir. 2007) (the State was acting as a market participant when it required transportation vehicles purchased with State funds to meet environmental standards); *Tocher*, 219 F.3d at 1049–50.

market" cannot extend to imposing restrictions on the "drayage market."[12] To be sure, the State does not act as a market participant *every time* it manages *any* of its property. *See Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 881–82 (9th Cir. 2006). In Olympic Pipe Line, for example, the City of Seattle was not acting as a market participant when it

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[12] ATA argues that, in *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97–98, 104 S. Ct. 2237, 81 L. Ed. 2d 71 (1984) (plurality), the Supreme Court limited the market participant doctrine to State actions taken in a "narrow" market defined by contractual privity. *Wunnicke* is not controlling precedent on this question. Its discussion of the market participant doctrine did not garner a majority of justices. *See id.* at 93–98, 104 S. Ct. 2237 (majority op.); *id.* at 101, 104 S. Ct. 2237 (Powell, J., in a concurrence in part and concurrence in the judgment joined by Burger, C.J.) (stating that they would remand to allow the Court of Appeals to apply the market participant doctrine in the first instance); *id.* at 101–103, 104 S. Ct. 2237 (Rehnquist, J., in a dissent joined by O'Connor, J.) (arguing that the market participant doctrine applied). Indeed, *Wunnicke* is a perfect example of the Supreme Court's fractured views on the market participant doctrine. *See Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1056 (9th Cir. 1987).

Subsequent cases either distinguish *Wunnicke* as an outlier involving special considerations of natural resources, foreign commerce, and restrictions on resale, or cite *Wunnicke* for general positions of law not unique to its analysis. *See, e.g., Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 348 n. 17, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008) (responding to the dissent and distinguishing *Wunnicke* as a case involving three unique circumstances); *United Haulers Ass'n, Inc. v. Oneida–Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 340 n. 4, 127 S. Ct. 1786, 167 L. Ed. 2d 655 (2007) (citing *Wunnicke* as an example of local-processing requirements invalidated by the Court); *Shell Oil*, 830 F.2d at 1057–58 (citing *Wunnicke* for the proposition that "contractual privity does not insulate a state or local body from commerce clause scrutiny").

refused to renew a franchise agreement giving a right of way under city streets to a natural gas pipeline because the pipeline did not conduct tests at the behest of the city. *Id.* at 875–76, 882. We noted that, despite the city's claim that it was acting as a landlord, the city's "interest is not that of a private market participant that owns a pipeline or competes in the pipeline market *or a related market*." *Id.* at 881 (emphasis added). Rather, we stated that "Seattle in its sovereign capacity owns the streets and land under which the Seattle Lateral [pipeline] runs, for the purpose of maintaining a transportation system" and the city sought to exercise its power to protect public health and safety. *Id.* at 882; *see also Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1057–58 (9th Cir. 1987) (holding that a city "is not a market participant ... in deciding whether, or on what terms to grant a franchise for the use of city streets").

In this case, we are not faced with a situation where the Port is managing property "in its sovereign capacity," or imposing restrictions unrelated to its business interests as a property manager. As the district court recognized, the Port of Los Angeles is a business entity, operating wholly separately from the city government. It is entirely self-sustaining and does not depend on city funds. Furthermore, the Port has a business interest in the drayage market. The Port's business is to provide a point of entry for ships to unload goods. The Port necessarily requires the interrelated service of drayage trucking in order to transport those goods to customers or points of forwarding. The district court found that (1) the "Port has a direct financial interest in the

unhindered and efficient flow of cargo through its terminals and in increasing container traffic through the Port"; (2) the Port "needs to continually improve the efficiency of cargo operations at the Port to maintain its competitive position with respect to other ports and capture additional business"; and (3) a supply of drayage trucks and drivers is integral to cargo movement at the Port. ATA does not challenge those factual findings as clearly erroneous. Accordingly, we must conclude that even though the Port does not purchase drayage services, such services are an integral part of Port business. The drayage and port markets are so closely related that the Port's interest in managing its facilities can extend to imposing conditions on drayage carriers that operate on Port property.[13]

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[13] Both parties discuss as persuasive authority cases from other circuits and district courts addressing the market participant doctrine in the general context of State facilities. *See Sprint Spectrum L.P.*, 283 F.3d at 420–21 (upholding under the market participant doctrine a school district's restrictions on cellular phone towers placed on school property); *Four T's, Inc. v. Little Rock Mun. Airport Comm'n*, 108 F.3d 909, 912–13 (8th Cir. 1997) (holding that State restrictions on rental car operators that leased airport terminal counter space fell within the market participant doctrine); *Smith v. Dep't of Agric.*, 630 F.2d 1081, 1083 (5th Cir. 1980) (holding that preferential placement for local farmers at a State-run farmers market did not fall within the market participant doctrine); *Aeroground, Inc. v. City & Cnty. of San Francisco*, 170 F. Supp. 2d 950, 958–59 (N.D. Cal. 2001) (holding for the purposes of a preliminary injunction that an airport was not acting as a market participant when it adopted a rule requiring employers operating at the airport to permit certain union actions); *Transp. Limousine of Long Island, Inc. v. Port Auth. of N.Y. & N.J.*, 571 F. Supp. 576, 581 (E.D.N.Y.1983).

We hold that when an independent State entity manages access to its facilities, and imposes conditions similar to those that would be imposed by a private landlord in the State's position, the State may claim the market participant doctrine. Here, the Port leases its facilities to terminal operators, and permits drayage trucks to access its facilities, for the purpose of moving cargo through the Port and increasing Port revenues. The Port has a financial interest in ensuring that drayage services are provided in a manner that is safe, reliable, and consistent with the Port's overall goals for facilities management. A private port owner could (and probably would) enter into concession-type agreements with licensed motor carriers in order to further its goals. *See Boston Harbor*, 507 U.S. at 231–32. We therefore conclude that the Port acted in its proprietary capacity as a market participant when it decided to enter into concession agreements.

We stop short, though, of holding that every provision of the concession agreements is saved from preemption. The Supreme Court has placed limitations on what a State, acting as a market participant, may do. "[W]here the [S]tate seeks to affect private parties' conduct unrelated to the performance of contractual obligations to the

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Factually, those cases are distinguishable, so any analogy to the holdings would be strained. *Cf. Tri-M*, 638 F.3d at 422 (the court must consider the government's actions in the specific context presented). These cases are useful only to illustrate that other courts examine whether a particular provision is actually related to the State's proprietary interest in managing its facilities, or whether it reflects the State's regulatory interest in unrelated industries.

[S]tate," the State's actions are "tantamount to regulation." *Johnson*, 623 F.3d at 1025–26 (quoting *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 289 (1986)); *see also Chamber of Commerce v. Brown*, 554 U.S. 60, 70 (2008). Accordingly, we must examine whether the provisions at issue further the State's interests as a facilities manager, or whether the provisions seek to affect conduct unrelated to those interests. The State's avowed purposes may be relevant, but we need not inquire into the State's undisclosed intentions. *See Gould*, 475 U.S. at 288 (examining the State's admitted motives); *Johnson*, 623 F.3d at 1026 (refusing to examine the State's "ulterior motives"). We do not examine each individual provision of the concession agreements at this point, saving that discussion for part V of this opinion.

C. Safety Exception

Finally, we consider whether the district court identified the correct legal principles in applying the safety exception to FAAA Act preemption. ATA argues that, notwithstanding the express safety exception of 49 U.S.C. § 14501(c)(2)(A), the Port has no authority to "revoke a motor carriers' ability to engage in interstate commerce." It argues that in *Castle*, 348 U.S. 61, the Supreme Court held that if interstate motor carriers violate the safety laws of the State, it is up to the federal government to "protect the State's interest" through federal enforcement proceedings. Thus, according to ATA, at the time the FAAA Act was passed, the State's regulatory authority did not permit it to revoke the ability of motor carriers to engage in interstate

commerce. ATA argues that the safety provision incorporates the then-existing regulatory authority of a State, and simply does not grant the States "independent power to make safety-related revocations."

Castle does not, however, stand for the proposition that the States have no power to limit motor carrier access to particular land in order to further safety. In *Castle*, Illinois punished freight carriers that repeatedly violated State limits on the weight of commercial trucks by totally suspending the carriers' right to use Illinois state highways for up to one year. 348 U.S. at 63. At the time, the Interstate Commerce Commission had the exclusive right to issue and revoke certificates permitting motor carriers to operate interstate. *Id.* at 63–64. The Court held that Illinois's action was "the equivalent of a partial suspension of [a motor carrier's] federally granted certificate," because Illinois highways were used "to transport interstate goods to and from [Illinois and] are also used as connecting links to points in other states." *Id.* at 64. Accordingly, Illinois's action was prohibited. *Id.* at 65. The Court stated, though, that Illinois remained free to impose "conventional forms of punishment" on over-weighted or improperly loaded motor trucks. *Id.* at 64. The Court also made clear that it "know[s] of no reason why the Commission may not protect the [S]tate's interest, either on the Commission's own initiative or on complaint of the [S]tate." *Id.* at 65. It did not, as ATA asserts, hold that only the federal government may impose punishment for a motor carrier's violation of State safety regulations.

Even if the FAAA Act incorporated (rather than modified) *Castle*'s limitations on the State's authority,[14] *Castle* does not preclude the Port from permitting access only to motor carriers that comply with its safety restrictions. Unlike a ban on using all of a State's freeways, a limitation on access to a single Port does not prohibit motor carriers from participating in "transport [of] interstate goods to and from that State" or eliminate "connecting links to points in other states." *Id.* at 64. While a denial of access to the Port may have more effect on motor carriers than a traditional fine, it does not rise to the level of the comprehensive ban at issue in *Castle*.

The district court did not err in applying the safety exception to this case. In addition, it correctly concluded that the safety exception is available only when a regulation is "genuinely responsive to safety concerns." *City of Columbus*, 536 U.S. at 442; *ATA–II*, 559 F.3d at 1053–54. The district court rightly examined the avowed intent of the government, and considered whether any " 'purported safety justifications' will withstand scrutiny." *ATA–II*, 559 F.3d at 1055 (quoting *Auto. Club of N.Y., Inc., v. Dykstra*, 520 F.3d 210, 215 (2d Cir. 2008) (per curiam)). In sum, we determine that the district court correctly identified the applicable law.

IV.

With these principles in mind, we analyze whether, and on what grounds, each challenged provision is subject to preemption by the FAAA Act. We agree

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[14] We express no opinion on this point.

with the district court that the financial capability provision has only a tenuous and remote connection to rates, routes, or services, so is not preempted by § 14501(c) of the FAAA Act. We also agree with the district court that the maintenance provision is intended to be and is genuinely responsive to safety, so is not preempted. We conclude that the off-street parking and placard provisions were adopted to address specific proprietary concerns faced by the Port as a facilities manager and do not seek to affect unrelated conduct by third parties, so fall under the market participant doctrine. We hold, however, that the employee-driver provision is pre-empted because it is tantamount to regulation.

A. Financial Capability Provision

The financial capability provision requires a concessionaire to "demonstrate[ ] to the satisfaction of the Executive Director that it possesses the financial capability to perform its obligations under th[e] Concession." As with the maintenance provision, the district court held that the provision did not relate to rates, routes, and services in more than a tenuous way. It concluded, however, that the provision was not genuinely responsive to safety. We agree with the district court that the financial capability provision does not relate to rates, routes, and services in a more than tenuous fashion, and is not preempted; we therefore do not apply the market participant doctrine or safety exception.

The financial capability provision does not directly impact the drayage services provided to customers (for example, picking up and transporting cargo). Nor does it directly regulate the routes served or the

prices charged. *Cf. Indep. Towers of Wash. v. Wash.*, 350 F.3d 925, 931–32 (9th Cir. 2003) (a State's regulation of payment method does not relate to the tow truck operator's route or service and is not preempted by § 14501(c)). Thus, we must consider whether the financial capability provision indirectly binds drayage carriers to particular rates, routes, or services. *Air Transport*, 266 F.3d at 1075. ATA argues only that the provision "gives POLA discretion to deny LMCs the right to provide drayage services on routes involving the Port"—apparently, that the financial capability provision *could* be used by the Port to deny access to otherwise qualified drayage carriers and thus affect routes. The district court disagreed, and its conclusion is well supported by the record. The Port has never refused to sign a concession agreement on the basis of the financial capability provision, and the motor carriers who testified indicated that the financial capability provision would not change their operations. While this does not preclude the *possibility* that the financial capability provision will effect rates, routes or services, it makes that possibility "tenuous or remote." *Rowe*, 552 U.S. at 371. Accordingly, we hold that the financial capability provision is not preempted by § 14501(c) of the FAAA Act.

B. The Maintenance Provision

The maintenance provision makes concessionaires "responsible for vehicle condition and safety" and requires them to "ensure that the maintenance of all Permitted Trucks ... is conducted in accordance with manufacturer's instructions." The district court held that the maintenance provision was not preempted

by the FAAA Act because it does not have more than an indirect, remote, or tenuous effect on rates, routes, or services. Alternatively, the district court concluded that, even if subject to preemption, the maintenance provision was genuinely responsive to safety concerns. Even assuming that the maintenance provision relates to rates, routes, and services,[15] we agree with the district court that the provision was intended to be and is genuinely responsive to safety and is thus exempt from preemption by the FAAA Act.

We conclude that the maintenance provision was intended to respond to safety concerns. The Port cited concerns about vehicle safety (including vehicle maintenance, repair and replacement, and driver safety) as motivations for adopting the concession agreements. The Port also "found that serious safety and security problems existed in connection with drayage trucks at the Port" and cited statistics

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[15] Though we do not rest our holding on this ground, we agree with the district court that the maintenance provision has only a tenuous and remote connection to rates, routes, and services. Requiring regular maintenance of trucks does not directly affect drayage pickups or deliveries, nor does it bind motor carriers to particular routes or types of services. Though one would suspect that maintenance could have a connection to costs and thus rates, the evidence introduced at trial established that the maintenance provision has not given rise to any significant additional costs and that concessionaires have not increased their rates as a result of complying with the provisions. ATA does not challenge as clearly erroneous the district court's factual finding that the maintenance provision has not changed the rates charged by motor carriers, further supporting our view that the maintenance provision is not related to rates and not preempted by the FAAA Act.

indicating that heavy duty vehicles accounted for a disproportionate share of traffic violations, accidents, and citations for improper maintenance.

ATA correctly notes that the maintenance provision was also motivated by environmental concerns. In particular, the Port wanted to ensure that all drayage trucks, including those purchased or retrofitted with State funds, continued to meet emissions standards over time. The presence of such mixed motives, though, does not preclude the application of the safety exception, provided that the State's safety motives are not pre-textual. *Cf. Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 145–47 (2d Cir. 2006). For example, in *Loyal Tire*, the city passed a towing ordinance with a broad general statement that towing regulations as a whole were in the public interest. *Id.* at 146. At the same time, there was significant evidence in the legislative history that the statute had been passed in order to discriminate against a particular out-of-town towing company. *Id.* at 146–47. Though the State alleged that it was actually responding to safety, it didn't document any safety issues until after litigation commenced. *Id.* at 146. In addition, there was no logical relationship between at least one of the city's purported safety justification and the measure at issue. *Id.* at 147–48. In light of this record, the court held that the city's purported safety justification did not withstand scrutiny. *Id.* at 148. Unlike *Loyal Tire*, nothing in the record here demonstrates that the Port's safety motives are illusory or pretextual—the Port's safety motivation is genuine, albeit operating in tandem with its other concerns. *Cf. Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765,

774 (2d Cir. 1999) (stating that because "it is difficult to treat these programs as a guise for economic regulation" the programs were "sufficiently safety-oriented to survive preemption under § 14501(c)").

We also agree with the district court that the maintenance provision is genuinely responsive to safety, because "requiring routine truck maintenance will no doubt help to ensure that drayage trucks are operating properly and safely, which will in turn likely prevent motor vehicle accidents." Again unlike in *Loyal Tire*, there is a logical connection here between the maintenance provision and motor vehicle safety. ATA argues that the maintenance provision is not genuinely responsive to safety because the Port has not demonstrated that requiring motor carriers to "comply with manufacturers' instructions" creates safety benefits *in addition* to those already created by federal law. In other words, according to ATA, because regular maintenance is already required by federal law, the Port must demonstrate that the non-duplicative portion of the maintenance provision—the requirement to comply with manufacturer's instructions—has an independent safety benefit.

We hold that State provisions duplicating federal law may still be genuinely responsive to safety. At the preliminary injunction phase of this case, we "reject[ed] ATA's contentions that the provisions are not safety-related simply because they duplicate already-existing federal laws." *ATA–IV*, 596 F.3d at 606. Our conclusion comports with the Supreme Court's decision in *City of Columbus*. One of the arguments raised in *City of Columbus* was that the

safety exception should not extend to municipalities because each one could adopt different regulations, which would be needlessly duplicative and burdensome. 536 U.S. at 441–42. The Court declined to adopt such a broad rule; instead, it noted that 49 U.S.C. § 31141 authorizes the Secretary of Transportation to void any State law that "has no safety benefit" and thus permitted the federal government to invalidate local safety regulations "upon finding that their content or multiplicity threatens to clog the avenues of commerce." 536 U.S. at 442.

Duplicity is not the death knell of a safety-related regulation. Because provisions that duplicate federal law may still have a safety benefit, we hold that the Port need not demonstrate that the requirement to comply with manufacturer's instructions creates safety benefits over and above those created by federal law. The maintenance provision falls within the safety exception and is not preempted.

C. Off–Street Parking Provision

The off-street parking provision requires concessionaires to submit for approval a "plan that includes off-street parking locations for all Permitted Trucks" and requires concessionaires to ensure that Permitted Trucks are "in compliance with parking restrictions by local municipalities." The district court held that the provision would probably affect motor carriers' rates, because the carriers would incur high costs in obtaining off-street parking and be forced to pass those costs on to consumers. It also concluded that the off-street parking provision was not genuinely responsive to safety because the Port

adopted the provision to mollify community opposition, rather than to address existing safety concerns. The Port does not challenge either of these holdings on appeal, so the off-street parking provision must rise or fall on the applicability of the market participant exception. The district court was correct that the concession agreements, as a whole, were adopted by the Port in its proprietary capacity as a facilities provider. The real issue is whether the off-street parking provision was adopted to further specific proprietary goals, or whether it is thinly-veiled regulation.

The Supreme Court confronted a case of thinly veiled regulation in *Gould*, 475 U.S. at 287–89. There, Wisconsin forbade its procurement agents to purchase any product manufactured or sold by any firm on a State-maintained list of repeat violators of the National Labor Relations Act (NLRA). *Id.* at 283–83. "[O]n its face the debarment statute serve[d] plainly as a means of enforcing the NLRA" and the State conceded that its point was "to deter labor law violations and to reward 'fidelity to the law.' " *Id.* at 287. The Court held that Wisconsin "simply is not functioning as a private purchaser of services," but instead attempting to impose a supplemental sanction for violations of the NLRA that "conflicts with the [federal government's] comprehensive regulation of industrial relations." *Id.* at 288. The Court did not believe that Congress would permit a State to interfere with that scheme "as long as [the States] did so through exercises of the spending power." *Id.* at 290. The Court explained that " '[i]t is the conduct being regulated ... that is the proper focus of concern.' " *Id.* at 289 (quoting *Amalgamated*

Ass'n of St. Elec. Ry. & Motor Coach Emps. of Am. v. Lockridge, 403 U.S. 274, 292 (1971)).

Unlike the provision in *Gould*, nothing on the face of the off-street parking provision indicates it was designed to circumvent the restrictions of the FAAA Act by disguising impermissible regulation as proprietary. Rather, the off-street parking provision and the documents adopting it indicate that it was designed to address specific proprietary problems. Prior to the enactment of concession agreements, community members complained that drayage trucks regularly parked in surrounding neighborhoods, posing safety and health risks. The Port believed that off-street parking would mitigate drayage trucks' negative impacts and increase the community good-will necessary to facilitate Port expansion. Enhancing good-will in the community surrounding the Port is an important and, indeed, objectively reasonable business interest, particularly since the community has already proved its ability to stymy Port growth and operations by pursuing litigation over health hazards and environmental impacts.

Further, maintaining Port security is an important business interest of the Port. The district court found that the Department of Homeland Security considers the Port part of one of seven " 'Group I' port areas at the highest risk of terrorist attacks." Jeffrey Brown, an expert in port security, testified that the off-street parking provision was "safety related" because, for example, parking vehicles carrying hazardous cargo on the street creates safety risks. The off-street parking provision therefore serves the Port's business interest in promoting Port security. Nor

does the off-street parking provision reach beyond the Port's participation in the market as a facilities provider and seek to impact the private behavior of third parties. The provision binds only those motor carriers operating on Port property, and applies to only those trucks permitted to operate at the Port. It is tailored to a specific proprietary problem facing the Port.

ATA argues that there were alternative ways for the Port to placate community concerns about truck parking; for example, by lobbying the city to change parking regulations, or by deploying Port police as agents of the city to enforce existing regulations. The fact that the State could have achieved its goals through regulation does not bear on the question of whether the Port's chosen means were regulatory or proprietary. Because the Port imposed the off-street parking provision only on those drayage trucks operating on Port property, and did so in response to perceived business necessity, we hold that the off-street parking provision falls within the market participant doctrine.

D. Employee–Driver Provision

The employee-driver provision requires all concessionaires to gradually cease using independent owner-operators for Port drayage. At the end of a five year period, each Port drayage driver must be an employee of a licensed motor carrier. The district court held that the provision was preempted by the FAAA Act as related to rates, routes and services, and rejected the Port's argument that the provision was safety related. The Port does not challenge those holdings on appeal, so the employee-driver provision

survives preemption only if it falls within the market participant doctrine.

The Port adopted the employee-driver provision for a number of reasons. The record is replete with evidence that the provision was designed to "ensure sufficient supply of drayage drivers by improvement of wages, benefits, and working conditions."[16] Essentially, the Port wanted to ensure that motor carriers would provide higher wages to drivers, thus enabling them to attract drivers to replace those lost through the TWIC program. In addition, the Port believed that the employee-driver provision would "protect the Port's investment in clean trucks" because it created an employer-employee relationship between truck drivers and subsidized concessionaires, ensuring that the trucks were owned and operated by persons with the means to maintain them. The Port also indicated that the employee-driver provision would be "easier to administer" because it would shift from the Port to employers the burden of maintaining records on each driver. *ATA II*, 559 F.3d at 1056.

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[16] In assessing the Port's motivations, we focus exclusively on the orders and published documents issued by the Port, and on statements made at trial by high-ranking Port officials. Both ATA and its amicus imply that statements of consultants hired by the Port reflect the Port's motivations. This argument is without merit, even though both reports were commissioned by the Port, and the Port ultimately adopted the course recommended by both reports. The consultants are not agents of the Port, and it is too much to conclude that every statement in each report was adopted by the Port or accurately reflects the Port's motivations.

We conclude that, under *Gould*, the employee driver provision seeks to impact third party behavior unrelated to the performance of the concessionaire's obligations to the Port. One of the Port's primary motives in adopting the employee driver provision was to increase stability in Port drayage by ensuring that drivers were paid higher wages. As a facilities provider, the Port has an interest in continued provision of drayage services, but it may not obtain that stability by unilaterally inserting itself into the contractual relationship between motor carriers and drivers. The Port, unlike the governmental entities in *Boston Harbor* or *Johnson*, does not pay driver salaries or subsidize benefits, so has no connection with drayage drivers justifying interference with the drivers' employment relationships. *Cf. Boston Harbor*, 507 U.S. at 231–32 (emphasizing that the State could require project labor agreements as a purchaser of construction services); *White*, 460 U.S. at 214 (holding that the city was entitled to the market participant doctrine because it expended its own funds in contracting for construction of public projects); *Johnson*, 623 F.3d at 1029–30 (noting that the State could require parties to maximize opportunities for minority and women-owned businesses as consideration for the benefits received from the State). While the Port may impose conditions on licensed motor carriers seeking to operate on Port property, it cannot extend those conditions to the contractual relationships between motor carriers and third parties.

The Port argues that it subsidized approximately 35% of the drayage trucks operating at the Port, and believes that employee-drivers will better protect

that investment. But the concession agreements bind all licensed motor carriers operating at the Port, not merely those who drive Port-subsidized trucks. Accordingly, even assuming that the Port's investment in drayage trucks entitles it to control the employment status of the drivers of subsidized trucks, the employee-driver provision still seeks to impact behavior beyond the scope of the obligations imposed by the subsidies. *Cf. Wyo. v. Okla.*, 502 U.S. 437, 456 (1992) (holding that a State which owned and operated an electricity plant did not act as a market participant in requiring all plants to use at least 10% Oklahoma coal).

We recognize that a facilities provider in the Port's position has a proprietary interest in streamlined administration. We also recognize that the employee-driver provision furthers this interest, because it permits the Port to hold accountable a smaller number of licensed motor carriers, rather than having to monitor a large number of independent owner-operators. Nevertheless, under the circumstances, this is insufficient to outweigh the Port's avowed desire to impact wages not subsidized by the State. The employee-driver provision is "tantamount to regulation" and thus does not fall under the market participant exception. *Gould*, 475 U.S. at 289.

E. Placard Provision

Lastly, the placard provision requires concessionaires to "post placards on all Permitted Trucks" when the trucks are "entering and leaving Port property and while on Port property." The placards shall "refer[ ] members of the public to a

phone number to report concerns regarding truck emissions, safety, and compliance to the Concession Administrator and/or authorities." Since April, 2009, the Port has provided sticker placards to motor carriers, although Permitted Trucks are allowed to use other placards.

The placard provision may be preempted by § 14501(c) of the FAAA Act, prohibiting regulations related to motor carriers' rates, routes, and services. We agree with the district court that the placard provision is genuinely responsive to motor vehicle safety, so not preempted by § 14501(c).[17] The placards help the Port to gather information about the safety of drayage truck operations, both on and off Port property. This information can be communicated to motor carriers and informs the Port's operations. The fact that many drayage trucks continue to display the placards off Port property (although nothing in the provision requires them to do so), and that community members have reported off-Port safety violations, does not diminish the placards' safety benefit.

Though it survives preemption by § 14501(c) because of the safety exception, the placard provision may be preempted by 49 U.S.C. § 14506(a), which prevents

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[17] As discussed in section IV.C *supra*, application of the FAAA's safety exception is not precluded by *Castle v. Hayes*, 348 U.S. 61, 75 S. Ct. 191, 99 L. Ed. 68 (1954). The placard provision is a reasonable measure aimed at promoting Port safety, which applies only while trucks are operating on the Port's private property. It is not comparable to Illinois' attempt to bar certain federally licensed motor carriers from its state highways, which was at issue in *Castle*.

States from enacting or enforcing any "provision having the force and effect of law that requires a motor carrier ... to display any form of identification on or in a commercial motor vehicle ... other than forms of identification required by the Secretary of Transportation." The district court erroneously concluded that the placards are not a "form of identification" because they merely list a phone number. The phone number, though, identifies the truck as one serving the Port, and falls within the broad scope of § 14506(a).

There is no safety exception to § 14506(a), *ATA–IV*, 596 F.3d at 606, but because it applies only to provisions having the force and effect of law, § 14506(a) does not apply to State proprietary action. *Cf. Cardinal Towing*, 180 F.3d at 695. The placard provision is proprietary in nature, and, under the market participant doctrine, is not preempted by § 14506(a). The Port adopted the placard provision in response to community concerns about drayage truck operation. The provision invites community participation and increases goodwill, thus facilitating Port expansion. As a facilities provider, the Port has a proprietary interest in receiving complaints about drayage trucks entering, leaving, and operating on its property. A private facilities provider would do the same. *Cf. Boston Harbor*, 507 U.S. at 231–32. The placard provision does not seek to impact third party behavior unrelated to the performance of contractual obligations to the State, but is concerned only with drayage truck operations immediately connected to the Port. Thus, it is not preempted.

V.

The district court meticulously identified and applied the governing law. We affirm the district court's holdings that the financial capability, maintenance, off-street parking, and placard provisions are not preempted. We reverse the district court's conclusion that the employee-driver provision is saved from preemption by the market participant doctrine, and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART AND REVERSED IN PART.

N.R. SMITH, Circuit Judge, dissenting in parts III.B., III.C., IV.B., IV.C., and IV.E. of the majority opinion:

I must dissent from the majority opinion because: (1) the market participant exception to preemption does not apply. Drayage services (not port services) form the relevant market, and the Port of Los Angeles (the "Port") acts as a regulator of drayage services. (2) Even assuming the Port qualifies as a proprietor, the off-street parking provisions are preempted, because they affect parties unrelated to contractual obligations to the Port. (3) The placard provision is preempted and not saved by the market participant doctrine or the safety exception, because California cannot revoke access to channels of interstate commerce and identification requirements on motor carriers are expressly preempted under 49 U.S.C. § 14506(a).

I. Market Participant Exception

The Port acts as a regulator (rather than a market proprietor) of drayage services. It is therefore ineligible for the "market participant" defense to federal preemption. We apply a two-prong test for distinguishing proprietary from regulatory actions:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?

Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1023–24 (9th Cir. 2010) (citation omitted). If the answer to *either* question is yes, the market participant exception applies. *Id.* at 1024.

The Port's regulation of drayage services does not qualify as "efficient procurement" of needed services. The Ninth Circuit has no controlling precedent on this point. However, the Fifth Circuit, in *Smith v. Department of Agriculture of the State of Georgia*, concluded that mere ownership of a facility does not make the government a participant in the markets operating in that facility. 630 F.2d 1081 (5th Cir. 1980); *cf. Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1057–58 (9th Cir. 1987) (holding that a city "control[ling] easements in the area beneath city streets, a commodity with value.... [with which] the

city competes with other entities[,] ... is not a market participant in the setting of franchise fees for easements under public streets"). In *Smith*, the Fifth Circuit held that Georgia acted as a market regulator when it leased booths to farmers at a state-owned-and-operated farmer's market that gave preferential treatment to Georgia farmers. Georgia acted as a *regulator*, rather than a proprietor, because it (1) did not "produce the goods to be sold at the market," (2) did not "engage in the actual buying or selling of those goods," and (3) had "simply provided a suitable marketplace for the buying and selling of privately owned goods." *Id.* at 1083. As the district court in this case suggested in an earlier order, *Am. Trucking Ass'ns., Inc. v. City of L.A.*, 577 F. Supp. 2d 1110, 1120 (C.D. Cal. 2008), and a concurring judge in *Smith* emphasized, the outcome of this test depends on the definition of the market: "[i]f the market is ... one in sale booths for produce, then Georgia [is a proprietor] of booths.... But [because] the relevant market [is] one in vegetables, ... [and] Georgia is not their producer or seller," Georgia is not a proprietor. *Smith*, 630 F.2d at 1086 (Gee, J., concurring).[1]

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[1] Also not controlling but persuasive is the case of *Fla. Transp. Serv., Inc. v. Miami-Dade Cnty.*, 757 F. Supp. 2d 1260 (S.D. Fla. 2010). In *Florida Transportation* the plaintiffs challenged the Port of Miami's limitation on the number of stevedores. *Id.* Regarding the market participant doctrine, the court found the county operating the Port of Miami not to be in the market of stevedoring just because it participates in the market for port services. *Id.* at 1282 ("[T]he county simply provides a suitable market place that it owns—the Port—for stevedores to offer their services.").

The majority states that the "efficient procurement" prong "is useful in cases where the government is buying goods or seeking services, but it is not the be-all-and-end-all of proprietary action." Maj. Op. at ——– (footnote omitted). Instead, the real inquiry is distinguishing between propriety and regulatory action. *See id.* In determining whether actions are "as a market participant or regulator, a court must examine whether the ... government has imposed restrictions that 'reach beyond the immediate parties with which the government transacts business.' " *Big Country Foods, Inc. v. Bd. of Educ. of Anchorage Sch. Dist.*, 952 F.2d 1173, 1178 (9th Cir. 1992) (citing *White v. Mass. Council of Constr. Emp'rs*, 460 U.S. 204, 211 n. 7 (1983) and *S.-Cent. Timber Dev. v. Wunnicke*, 467 U.S. 82, 95 (1984)).[2] "In *White*, ... Boston did not reach beyond the immediate parties by requiring contractors to hire local workers because everyone affected by the order was, 'in a substantial if informal sense, working for the city.' " *Id.* (citing *White*, 460 U.S. at 211 n. 7). "In contrast, the Court in *Wunnicke* found that the Alaska timber processing requirement constituted a 'downstream' regulation prohibited by the commerce clause." *Id.* (citing *Wunnicke*, 467 U.S. at 95).

Here, the Port reaches beyond the immediate parties with whom it transacts, because it does not transact business with drayage service providers. Unlike the rules requiring contractors to hire local workers in *White*, the Port does not require the shipping lines

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[2] Although *Wunnicke*, 467 U.S. 82, 104 S. Ct. 2237 (1984), is a plurality opinion, we cited its holding with approval in *Big Country Foods*, 952 F.2d at 1178.

and stevedoring companies (that rent terminals) to regulate the drayage service providers. Further, the drayage service providers do not, even in an informal sense, work for the Port. *See White*, 460 U.S. at 211 n. 7. Therefore, the Port reaches the limits of the market participation exemption. *Id.* (privity of contract is not the boundary of the market participation exemption, but "there are some limits on a ... government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business.").

The provision of maritime ports does not form the relevant market here; rather, the market is the provision of drayage services. The Port cannot be a proprietor in this market, because it neither purchases nor provides drayage services.[3] Indeed, the Port does not involve itself in *any* market activity with the independent contractors and companies providing drayage services. *See* Amicus Brief of the Center of Constitutional Jurisprudence 11–12. Therefore, the Port regulates third-party drayage providers in its capacity as a regulator, eliminating

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[3] In virtually every Ninth Circuit case finding that a government entity acted as a market proprietor, the government was actually participating in the marketplace by purchasing goods or services. *See, e.g., Engine Mfrs. Ass'n v. S. Coast Air Quality*, 498 F.3d 1031 (9th Cir. 2007) (holding that a state subdivision acted as a market participant in establishing air quality rules governing state and local governments' procurement of new fleet vehicles); *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1049 (9th Cir. 2000) (holding the City of Santa Ana acted as a market participant in "establishing rules and regulations to guide the formation of contracts for towing services provided exclusively to the City" (emphasis added)).

the Port's eligibility for the market participant defense.

II. Safety Exception

The majority applies the safety exception in this case by distinguishing *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954), and finding that it does not preclude the Port from banning access of motor carriers. Maj. Op. at ——— – ———.

In *Castle*, the Supreme Court held that Illinois could not revoke an interstate motor carrier's *access* to state highways for repeatedly violating the state highway regulations, because the federal government has assumed exclusive authority over the licensing of interstate motor carriers. 348 U.S. at 63–64. The Court explained that it would be "odd if a state could take action amounting to a suspension or revocation of an inter-state carrier's [federal government]-granted right to operate." *Id.* at 64. The Court further elaborated that

> [i]t cannot be doubted that suspension of this common carrier's right to use Illinois highways is the equivalent of a partial suspension of its federally granted certificate. The highways of Illinois are not only used by Hayes [Freight Lines] to transport interstate goods to and from that State but are also used as connecting links to points in other states which the Commission has authorized Hayes to serve. Consequently if the ninety-day or the one-year suspension should become effective, the carriage of interstate goods into Illinois and other states would be seriously disrupted.

Id. Although the state could not *revoke access* to its highways for operators who repeatedly violated the state's size and weight restrictions, the state could still (1) resort to "conventional forms of punishment" and (2) rely on *federal* authorities to protect the state's interest by mandating compliance with state regulations.[4] *Id.* at 64–65.

The Port does not dispute that the federal government continues to issue interstate transportation "registrations" or "permits" enabling trucking companies to transport cargo across state lines so long as they comply with federal safety and insurance regulations. *See, e.g.*, Motor Carrier Safety Act, Pub. L. No. 98–554, 98 Stat. 2829 (codified, in part, at 49 U.S.C. § 31144); Trucking Industry Regulatory Reform Act of 1994, Pub. L. No. 103–311, § 201, 108 Stat. 1683.[5] Thus, the preemption analysis

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[4] California recognized this enduring limit on its authority to regulate interstate motor carriers when it enacted the Motor Carrier Safety Improvement Act of 1996. The Act provides, in part, that if the California Highway Patrol determines a commercial carrier has engaged in "consistent failure" to comply with safety requirements "so as to justify a suspension or revocation of the motor carrier's motor carrier permit ... *for interstate operators*, the [Highway Patrol] shall *recommend* to the Federal Motor Carrier Safety Administration that appropriate administrative actions be taken against the carrier...." Cal. Veh. Code § 34505.6(a) (emphasis added). This enforcement scheme is consistent with *Castle* in that California relies on federal authorities to revoke an interstate offender's permit where the state would otherwise revoke an *intra* state offender's transportation permit for the same conduct.

[5] The district court concluded, without analysis, that *Castle* does not apply, because the FAAA Act was enacted 40 years after *Castle*. However, the FAAA Act did not expand states' authority to regulate interstate motor vehicles, even on safety

in *Castle* still applies, even if the form of comprehensive federal regulation has changed over the years.[6] Additionally, contrary to the district court's holding, drayage operations between the Port of Los Angeles and other points (even within California) constitute interstate commerce. They are part of the continuous flow of goods between locations *outside* California and customers *within* California. *Klitzke v. Steiner Corp.*, 110 F.3d 1465, 1469 (9th Cir. 1997) ("Whether any particular shipment is interstate is determined ... by the essential character of the commerce, *manifested by shipper's fixed and persisting transportation intent at the time of shipment*, and is ascertained from all of the facts and circumstances surrounding the transportation." (internal quotation marks and citation omitted) (emphasis in original)).

Therefore, interstate drayage operations are the regulatory province of the federal government.

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grounds. In addressing this very question, Congress explained that "nothing in these new subsections contains a new grant of Federal authority to a State to regulate commerce and nothing in these sections amends other Federal statutes that govern the ability of States to impose safety requirements...." H.R. Rep. No. 103–677 at 84 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1757.

[6] The United States, writing as amicus curiae in this case, also argued that *Castle* and its progeny are still in full effect, explaining "the Supreme Court has recognized that 'comprehensive federal regulation precludes state or local entities from 'exercising any veto power over' interstate commerce service providers.' " *See* Motion Granting in Part and Denying in Part Plaintiff's Motion on Remand for Entry of Preliminary Injunction, Case No. 2:08–cv–04920–CAS–CT, Dkt. No. 155, at 6 (citing *Castle*, 348 U.S. at 64, 75 S. Ct. 191).

California agencies may promulgate safety regulations for drayage operators and may utilize "conventional forms of punishment" for violating these regulations (e.g., fines). However, *revoking access*, under *Castle*, is an enforcement mechanism beyond the reach of California and its political sub-parts, including the Port.

The opinion attempts to distinguish *Castle*, because a limitation on access to a single Port does not prohibit the motor carriers from participating in transport of interstate goods to and from the state or rise to the level of the comprehensive statewide ban at issue in *Castle*. Maj. Op. at ——— – ———. However, the ban in *Castle* did not "prohibit" offending motor carriers from participating in interstate commerce or "eliminate" connecting links to other states. Instead, as the Supreme Court characterized it, the ban (1) "partially suspended" the motor carrier's federally granted permit to travel interstate, and (2) "seriously disrupted" (rather than "eliminated") the motor carriers' carriage of goods into Illinois and other states. There were obviously alternatives available to carriers in *Castle*, whose state licenses were suspended, but the state enforcement scheme placed impermissible burdens on a federally-regulated *interstate* commercial activity. The same problem arises in this case. Barring access to the Port of Los Angeles—the largest port in the United States and one of only a handful of large commercial deep-water ports on the West Coast—would no doubt "seriously disrupt" drayage carriers' ability to transport goods from ships to other destinations in and outside California. Indeed, barring access is a "partial suspension" of drayage carriers' federal permits to

transport goods in the stream of interstate commerce.

Thus, although the Port can avail itself of the traditional remedies discussed in *Castle*, it cannot step into the shoes of the federal government and partially revoke drayage carriers' access to the channels of interstate commerce. Therefore, the Port cannot justify any of the challenged regulations on the basis of safety. California's safety regulations cannot disrupt Federal authority over interstate travel of motor carriers.

III. Off-street Parking Provisions

Even if the Port qualified as a proprietor, the off-street parking provisions do not qualify as "efficient procurement" of services. The Port "seeks to affect private parties' conduct unrelated to the performance of contractual obligations to the [Port]." *Johnson*, 623 F.3d at 1026. The off-street parking provisions attempt to address political concerns the Port alleges local community members have raised regarding drayage truck parking practices, which are not related to any contracts between drayage providers and the Port.

The off-street parking provisions cannot survive preemption, either because (1) the Port is not acting as a market participant in the "efficient procurement" of services simply by virtue of its ownership of Port facilities, or (2) the agreement's far-reaching provisions affect conduct beyond any direct obligations of drayage providers to the Port.

IV. Placard Provision

A. Preemption under 49 U.S.C. § 14501(c)

The placard provision (requiring concessionaires to post placards on all drayage trucks when the trucks are "entering and leaving Port property and while on Port property") may be preempted under 49 U.S.C. § 14501(c), if it relates to motor carriers' prices, routes, and services. The majority does not determine whether the placard provision relates to prices, routes or services because of its reliance on the safety exception to overcome preemption. Maj. Op. at ——. However, this provision is not saved by the safety exception (as the majority concludes), because the state cannot impede Federal authority to allow motor carriers access to interstate travel, as noted above. Nevertheless, finding preemption under § 14501(c) is not required, because § 14506(a) clearly preempts the placard provision.

B. Preemption under 49 U.S.C. § 14506(a)

The Port-mandated placard is a "form of identification" under 49 U.S.C. § 14506(a), because it identifies a truck as one serving the Port and provides a phone number to report unsafe activity. Section 14506(a) provides:

> No State [or] political subdivision of a State ... may enact or enforce any law, rule, regulation, standard, or any other provision having the force and effect of law that requires a motor carrier ... to display any form of identification on or in a commercial motor vehicle ... other than forms of

> identification required by the Secretary of Transportation.

Because the placard provision requires drayage operators to display "any form of identification on or in a commercial motor vehicle," the provision is plainly preempted. Further, as explained above, this requirement cannot be saved from preemption as a "proprietary" action lacking the "force and effect of law," because the Port is acting as a regulator (rather than proprietor) of drayage services.

V. Miscellaneous

The district court correctly held that the maintenance provision would have only a tenuous effect on prices, routes, and services. *See* Maj. Op. at 18224. The record indicates that the time and cost of such compliance is minimal. The plaintiffs had the burden to show more than a tenuous effect, and they did not. Therefore, even though the majority did not rely on this reasoning, I concur with the conclusion of the majority that the maintenance provision is not preempted. However, I do not agree with the majority that the safety exception would save the maintenance provision for the reasons set out previously.

I agree with the majority that the concession agreements fail the narrow scope prong of the market participant test. Further, I concur that the employee-driver and financial capability provisions are preempted by federal law.

APPENDIX B

United States District Court,
C.D. California,
Western Division.

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Plaintiff,

v.

The CITY OF LOS ANGELES; et al., Defendants.

No. CV 08-4920 CAS (RZx).
Aug. 26, 2010.

Attorneys and Law Firms

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Opinion

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CHRISTINA A. SNYDER, District Judge.

This case was tried to the Court on April 20, 21, 22, 23, 27, 28, and 29, 2010. The parties filed their post-trial briefs on May 14, 2010. Robert Digges, Jr. of the ATA Litigation Center, and Christopher McNatt, Jr. of Scopelitis, Garvin, Light, Hanson & Feary, LLP, appeared on behalf of plaintiff American Trucking Associations, Inc. ("ATA"). Steven Rosenthal, Alan Palmer, and Susanna Chu of Kaye Scholer LLP, and Thomas Russell and Simon Kann of the Los Angeles City Attorney's Office, appeared as counsel on behalf of defendants City of Los Angeles, the Harbor Department of the City of Los Angeles, and the Board of Harbor Commissioners of the City of Los Angeles. David Pettit and Melissa Perrella of the Natural Resources Defense Council ("NRDC"), appeared as counsel on behalf of intervenor defendants NRDC, Sierra Club, and Coalition for Clean Air, Inc.

I. INTRODUCTION

On March 20, 2008, defendant Los Angeles Harbor Board of Commissioners adopted an order which provides that "beginning October 1, 2008, at 8:00 am, no Terminal Operator shall permit access into any Terminal in the Port of Los Angeles to any Drayage Truck unless such Drayage Truck is registered under a Concession from the Port of Los Angeles ..." The Los Angeles Concession Agreement requires that

motor carriers accessing the Port of Los Angeles ("POLA" or "the Port") comply with a number of requirements in order to maintain this access.[1]

On July 28, 2008, ATA filed the complaint in this action against defendants City of Los Angeles, Harbor Department of the City of Los Angeles, and Board of Harbor Commissioners of the City of Los Angeles (collectively "POLA"), and City of Long Beach, Harbor Department of the City of Long Beach, and Board of Harbor Commissioners of the City of Long Beach.[2] The first and second claims allege that the Los Angeles Concession Agreement is preempted by the Supremacy Clause of the United States Constitution and the motor carrier provision of the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 14501(c) ("the FAAA Act"). The third claim alleges that the Concession Agreement is preempted because it places an undue burden on and discriminates against the right of motor carriers to engage in interstate commerce.

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[1] On February 19, 2008, defendant Long Beach Harbor Board similarly mandated that drayage trucks would be required to hold a Concession Agreement with the City of Long Beach in order to enter the Port of Long Beach (together with the Port of Los Angeles, "the Ports") beginning on October 1, 2008.

[2] On October 20, 2009, the Court dismissed the Long Beach defendants with prejudice pursuant to the parties' stipulation of settlement. That settlement agreement is now the subject of a collateral attack by the intervenors herein. *See Natural Resources Defense Council, Inc. v. City of Long Beach*, No. CV10-826 CAS (PWJx).

On July 30, 2008, ATA moved for a preliminary injunction pursuant to the first and second claims for relief restraining implementation of the Ports' mandatory Concession Agreements. On September 9, 2008, this Court denied ATA's motion for a preliminary injunction. *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 577 F. Supp. 2d 1110 (C.D. Cal. 2008). The Court found that ATA would likely demonstrate that the Concession Agreements "related to a price, route, or service" of motor carriers, which would generally render them preempted under the FAAA Act. *Id.* at 1118; *see* 49 U.S.C. § 14501(c)(1). The Court further determined that ATA would have a significant likelihood of success in showing that "the fact that the Ports sit on sovereign tidelands does not exempt [the Concession Agreements] from preemption under the FAAA," and that "the market participant exception to preemption does not apply in this case." *Id.* at 1118-1123; *see Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 498 F.3d 1031, 1040 (9th Cir. 2007) (holding that in cases of statutory preemption, "the market participant doctrine is based on the proposition that pre-emption doctrines apply only to state regulation.") (emphasis added). However, the Court held that ATA was nevertheless unlikely to succeed on the merits, because the Concession Agreements likely fell under the FAAA Act's statutory "safety exception." *Id.* at 1125; *see* 49 U.S.C. § 14501(c)(2)(A) (preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles ..."). Moreover, the Court concluded that the Supreme Court's holding in *Castle v. Hayes Freight Lines, Inc.*, 349 U.S. 61 (1954), did not preclude application of the "safety

exception" to the Concession Agreements. *Id.* at 1125 (citing 349 U.S. at 63-64 (holding that under the Federal Motor Carrier Act, a state could not punish a motor carrier for repeated violations of safety standards by suspending the motor carrier's right to engage in interstate commerce over the state's roads)). The Court also found that ATA had not shown a likelihood of irreparable harm, and that the balance of the hardships and the public interest weighed in favor of denying the injunction. *Id.* at 1126-1128. On March 20, 2009, in *Am. Trucking Ass'ns Inc. v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009) (hereinafter "*Am. Trucking I*") the United States Court of Appeals for the Ninth Circuit reversed the Court's September 9, 2008 order, finding instead that the "safety exception" to the FAAA Act likely did not apply to at least some of the provisions of the Concession Agreements. 559 F.3d at 1055-1057. The Ninth Circuit remanded the case to this Court for further proceedings. *Id.*

Following the decision in *Am. Trucking I*, in April 3, 2009, ATA filed a motion for entry of preliminary injunction on counts I and II of the complaint. On April 28, 2009, this Court issued an order granting in part and denying in part ATA's motion, which enjoined POLA from implementing and enforcing various provisions of the Concession Agreement.[3] *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, No. 08-4920 CAS (CTx), 2009 WL 1160212, at * 7 (C.D.

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[3] Specifically, the Court enjoined POLA from enforcing several provisions currently at issue in the instant action, *see infra* section II, including the employee driver provision, the off-street parking provision, and the financial capability provision.

Cal. Apr .28, 2009). This Court again found that the holding in *Castle*, 349 U.S. at 61, was inapplicable to the instant case.[4] *Id.* On February 24, 2010, the United States Court of Appeals for the Ninth Circuit affirmed the Court's April 28, 2009 order with one limited exception, in *Am. Trucking Ass'ns Inc. v. City of Los Angeles*, 596 F.3d 602 (9th Cir. 2010) (hereinafter "*Am. Trucking II*"). Specifically, the Ninth Circuit affirmed this Court's holding that certain provisions of the Port's Concession Agreement are preempted by the FAAA Act, and that the preempted provisions of the Concession Agreement are severable. *Id.* at 605-07. The Ninth Circuit in *Am. Trucking II* vacated this Court's finding that the requirement that drayage trucks display identifying placards with a telephone number fell within the motor vehicle safety exception to the FAAA Act, and remanded in order for this Court to consider whether 49 U.S.C. § 14506(a) preempts the requirement. *Id.* at 606. On February 25, 2010, this Court denied both ATA's and POLA's cross-motions for summary judgment.

Because the parties have now provided the Court with a complete evidentiary record, the Court will revisit each of the issues upon which it previously ruled.

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[4] Upon review, the Ninth Circuit held that "[f]or purposes of a preliminary injunction, we conclude that *Castle* does not establish the likelihood of ATA succeeding on the merits on this issue. However, this issue is not finally resolved and may be reconsidered in further proceedings for a permanent injunction." 596 F.3d at 607.

II. THE CONCESSION AGREEMENT PROVISIONS AT ISSUE

In the instant proceeding, ATA challenges five provisions of the Los Angeles Concession Agreement. Apr. 20 Tr. at 16:15-21 (ATA Opening). Motor carriers must comply with these requirements, among others, in order to maintain access to the Port. The five challenged provisions are as follows:

> 1. The Employee Driver Provision. This provision provides in relevant part: Driver Hiring.... Concessionaire shall be granted a transition period, as set forth in the schedule below, by which to transition its Concession drivers to 100% Employee Concession drivers by no later than December 31, 2013 ("Transition Period").... Ex. 181 ¶ III(d), "POLA Concession Agreement."
>
> 2. The Off-Street Parking Provision. This provision provides in relevant part: Compliance with Truck Routes and Parking Restrictions. Concessionaire shall submit for approval by the Concession Administrator, an off-street parking plan that includes off-street parking location(s) for all Permitted Trucks. Concessionaire shall ensure that all Permitted Trucks are in compliance with on-street parking restrictions by local municipalities. Permitted Trucks not in service shall be staged off public streets and away from residential districts....
>
> Ex. 181 ¶ III(f), "POLA Concession Agreement."
>
> 3. The Maintenance Provision. This provision provides: Truck Maintenance. Concessionaire

shall prepare an appropriate maintenance plan for all Permitted Trucks. Concessionaire shall be responsible for vehicle condition and safety and shall ensure that the maintenance of all Permitted Trucks, including retrofit equipment, is conducted in accordance with manufacturer specifications. Maintenance records for all Permitted Trucks shall be available for inspection by the Concession Administrator during business hours. Ex. 181 ¶ III(g), "POLA Concession Agreement."

4. The Placard Provision. This provision provides: Placards. When entering and leaving Port Property and while on Port Property, Concessionaire shall post placards on all Permitted Trucks referring members of the public to a phone number to report concerns regarding emissions, safety and security compliance to the Concession Administrator and/or authorities.

Ex. 181 ¶ III(l), "POLA Concession Agreement."

5. The Financial Capability Provision. This provision provides: Financial Capability. Concessionaire shall demonstrate to the satisfaction of the Executive Director that it possesses the financial capability to perform its obligations under this Concession over the term of the Agreement.

Ex. 181 ¶ III(n), "POLA Concession Agreement."

III. FINDINGS OF FACT

A. The Parties

1. The City of Los Angeles (the "City") is a municipal corporation established under Article XI of the Constitution of the State of California and is a political subdivision of that state. Defendant Harbor Department of the City of Los Angeles is a department of the City of Los Angeles. Defendant Board of Harbor Commissioners ("Board" or "BHC") controls the assets and facilities of the Harbor Department. Pretrial Conf. Order ¶ 5.

2. Plaintiff ATA is the non-profit national trade association for the trucking industry established under the laws of the Commonwealth of Virginia as a federation of affiliated state trucking associations, conferences, and organizations representing every type and class of motor carrier in the country. The Intermodal Motor Carriers Conference ("IMCC") is an affiliated conference of ATA and is open to all ATA member companies engaged in the intermodal transportation of property. The IMCC provides services to the intermodal (land-sea) motor carrier members of ATA and represents the interests of these members in a broad range of federal, state, local, and industry policy forums. Pretrial Conf. Order ¶ 5.

3. ATA and the IMCC's membership include motor carriers that provide drayage services at the Port. The Executive Committee of ATA and the IMCC Board authorized and directed that a legal challenge to POLA and the Port of Long Beach Concession Agreements be brought on behalf of ATA members.

ATA and the IMCC authorized this litigation to protect an interest germane to the interests of those organizations. The vindication of its members' rights is central to ATA's mission, as is set forth in the Bylaws of the American Trucking Associations, Art. II. 1, which provides, "[t]he membership of ATA shall be composed of companies, including independent owner-operators ...", and the IMCC Bylaws, Art. III(a), which provides, "[t]o promote and protect the interests of intermodal motor carriers on legislative and regulatory issues at all levels of government," and the ATA Mission Statement, which provides that it is, "to serve and represent the interests of the trucking industry ...." Pretrial Conf. Order ¶ 5.

4. Intervenor NRDC is a not-for-profit membership organization incorporated under the laws of the State of New York. The NRDC maintains an office in Santa Monica, California. Intervenor Sierra Club is incorporated in the State of California as a Nonprofit Public Benefit Corporation and maintains an office in Los Angeles, California. Intervenor Coalition for Clean Air, Inc. is a nonprofit organization based in California and maintains an office in Los Angeles, California. Pretrial Conf. Order ¶ 5.

B. The Port of Los Angeles

5. The Port is formally organized as the Los Angeles Harbor Department. Pursuant to the City Charter, the Port is an independent, self-funding department of the City of Los Angeles. Pursuant to Article VI of the City Charter, a five-member Board of Harbor Commissioners has the authority to manage Port assets and Port-related activity and to make and enforce all necessary rules and regulations relating

to Port operations within the geographic boundaries of the Harbor District. Pretrial Conf. Order ¶ 5.

6. The Port is located along 43 miles of the coast of San Pedro Bay, approximately 20 miles south of downtown Los Angeles adjacent to the Port of Long Beach (collectively with POLA, the "Ports"). Several residential areas adjoin the Port, including the neighborhoods of San Pedro and Wilmington. Over two million people reside in the communities surrounding the Ports. Pretrial Conf. Order ¶ 5.

7. The Port is the leading container port in the United States in terms of shipping container volume and cargo volume, and in 2008 handled more than $240 billion in cargo. Pretrial Conf. Order ¶ 5.

8. The total value of cargo handled at the Port was $240.4 billion in 2007. POLA's top trading partners in that year in terms of cargo value were: China ($115.2 billion); Japan ($39.2 billion); Taiwan ($14.6 billion); South Korea ($9.7 billion); and Thailand ($6 .9 billion). Based on its 2007 cargo volume, POLA ranked as the busiest container port in the United States, the thirteenth busiest in the world, and the fifth busiest in the world when combined with the cargo volume of the adjacent the Port of Long Beach. Pretrial Conf. Order ¶ 5.

9. In the years 2007-2009, POLA handled more containers than any other port in the United States. Pretrial Conf. Order ¶ 5.

10. The cargo handled at the Port is usually transported in shipping containers of a standard size (sometimes referred to as twenty-foot equivalent

units or "TEUs"). This form of cargo can be offloaded directly from ships onto railcars or truck tractor-trailers for transfer inland. Ex. 187, "POLA Website FAQs."

11. In addition to containerized cargo, POLA also handles passengers, automobiles, liquids, dry bulk, and breakbulk cargo with facilities specific to each type of cargo. Ex. 187, "POLA Website FAQs."

12. As the leading seaport in North America in terms of shipping container volume and cargo value, the Port generates over 900,000 regional jobs and more than $39 billion in annual wages and tax revenues. Ex. 183, "Husing Report"; Ex. 187, "POLA Website FAQs."

13. The Port is self-sustaining solely from revenues it receives from property leases and fees for dockage, wharfage, storage, royalties, and other port services. Thus, the Port operates without taxpayer support and is designated in the City Charter as a "Proprietary Department," controlling its own funds separately from the rest of the City. Ex. 187, "POLA Website FAQs"; Apr. 27 Tr. at 45-46 (Freeman).

14. The California State Tidelands Act of 1911 and subsequent legislative acts granted the tidelands and waterfront in San Pedro Bay to the Cities of Los Angeles and Long Beach as trustees for the benefit of the people of California. Ex. 245, "Ordinance No. 179981." Subsequent litigation between the United States and the State of California in an original proceeding before the U.S. Supreme Court confirmed that California had sovereign title to the tidelands in San Pedro Bay granted to Los Angeles and Long

Beach. *United States v. California*, 382 U.S. 448-53 (1966).

15. All or virtually all of the marine terminals at the Port are located on sovereign tidelands, which the City of Los Angeles holds as trustee subject to the tidelands trust. Ex. 245, "Ordinance No. 179981."

16. The Port operates as a landlord port in that it develops terminal facilities and then leases those facilities to shipping lines and stevedoring companies, sometimes referred to as marine terminal operators ("MTOs"). Ex. 267, "CAAP Technical Report"; Ex. 356, "Steinke Decl."

17. The MTOs load and unload ships, moving cargo between the vessel and the terminal. They receive and dispatch cargo into and out of their facilities via rail and truck. This movement of cargo between a marine terminal and a local destination by truck is commonly referred to as "drayage." Ex. 183, "Husing Report."

18. Motor carriers draying cargo to and from the Port act under contract to ocean carriers, cargo owners, freight forwarders, and brokers, and other transportation intermediaries and carriers. Ex. 183, "Husing Report."

19. Motor carriers dray containers under bills of lading for each container that designate the points of origination and destination, under the direction of the cargo owner or its agent. Ex. 183, "Husing Report."

20. In many cases motor carriers dray containers under "store-door" tariffs of ocean carriers in which the ocean carrier is compensated for the transit between a shipper location in the United States and a foreign port. In some cases, the bill of lading specifies through transportation by rail to or from the Port, and the drayage carrier serves as a contractor to dray the container between a marine terminal at the Port and an "off-dock" railhead outside the Port. Ex. 183, "Husing Report."

21. The majority of drayage trips take place within the State of California. The Port estimates that drayage trucks transport less than 5% of the cargo that they pick up at POLA to points outside of California, and ATA does not appear to dispute this.

22. A supply of drayage trucks and drivers is integral to cargo movement at the Port. Ex. 183, "Husing Report."

23. The Port has a direct financial interest in the unhindered and efficient flow of cargo through its terminals and in increasing container traffic through the Port terminals. The Port's revenue is directly tied to the volume of containers moved through the terminals. The greater the volume of containers handled at the Port, the greater are the Ports' revenues. Apr. 27 Tr. at 45-46 (Freeman); Ex. 191, "BCG Report."

24. In light of increasing global trade and larger ships, POLA expects cargo volumes at the Port to increase at a pace sufficient to at least double the demand for cargo-handling capacity over the next decade. Ex. 272, "Sahagun Article"; Ex. 281, "POLA

Stakeholder Presentation"; Ex. 353, "California Air Resources Board Report."

25. POLA faces competition from other U.S. ports along the Pacific coast, the Atlantic coast, the Gulf of Mexico and foreign ports emerging in Mexico and Canada. POLA also faces additional competition because of the scheduled 2014 completion of the Panama Canal expansion. Ex. 245, "Ordinance No. 179981."

26. The Port needs to continually upgrade and renovate existing terminals and facilities to maintain its competitive position with respect to other ports and capture additional business through improved cargo capacity. Ex. 191, "BCG Report"; Apr. 27 Tr. at 45-46 (Freeman).

27. POLA also needs to continually improve the efficiency of cargo operations at the Port to maintain its competitive position with respect to other ports and capture additional business. *Id.*

28. POLA markets itself to potential customers, among other things, on the basis of the efficiency of its terminal operations, its experienced labor force, the quality of its infrastructure, and the "clean" nature of the drayage trucks serving the Port. *See* Exs. 291-96, "POLA Advertisements."

C. Environmental Impacts Associated with Operations at the Port

29. The Port is located in California's South Coast Air Basin (the "Basin"), which has been designated by the United States Environmental Protection

Agency as a non-attainment area for the National Ambient Air Quality ("NAAQ") standards, for the 8-hour ozone standard, and for the annual fine particulate matter standard. At least in 2008, the Basin had the worst air quality in the nation for these pollutants. Ex. 245, "Ordinance No. 179981."

30. As of 2008, California's South Coast Air Quality Management District ("SCAQMD") calculated that it could not achieve the NAAQ standards for ozone and particulate matter by the dates specified in the federal Clean Air Act without significant reductions of diesel particulate matter ("DPM") and of particulate matter precursor pollutants nitrogen-oxides ("NOx") and sulfur-oxides ("SOx") from Port operations. Ex. 267, "CAAP Technical Report"; Ex. 337, "SCAQMD 2007 Air Quality Management Plan."

31. Emissions inventory data for 2002 indicated that activities at the Ports are responsible for 24 percent of the total DPM, 11 percent of NOx, and 45 percent of SOx emitted in the South Coast Air Basin. By 2020, activities at the Ports were projected to contribute almost a third of the South Coast Air Basin's DPM, a quarter of its NOx, and over three-fifths of its SOx. Ex. 336, "SCAQMD MATES III Study."

32. SCAQMD found that, as of 2008, the area around the Port suffered an average cancer risk from air pollution that was more than 60 percent higher than the average in the South Coast Air Basin (1415 in a million for the Port area; 853 in a million for the basin). Apr. 23 Tr. at 15 (Chang); Ex. 336, "SCAQMD MATES III Study."

33. Prior to the implementation of the Port's Clean Truck Program, SCAQMD considered dramatic reductions in diesel truck emissions to be critical to the attainment of the federal air quality standards, because drayage trucks are major emitters of NOx and DPM. Apr. 23 Tr. at 12-20 (Chang); Ex. 336, "SCAQMD MATES III Study."

34. Prior to the implementation of the Clean Truck Program, trucks used in drayage operations at the Port (the "drayage truck fleet" or "drayage trucks") tended to be older than those used by national long-haul truck fleets. Drayage trucks typically started out as long-haul trucks that were then sold to smaller, lower-cost carriers who used them to the end of their useful long-haul lives before selling the trucks to drayage carriers for Port use. Apr. 27 Tr. (Freeman).

35. Prior to implementation of the Clean Truck Program, drayage trucks accounted for between 10 and 24 percent of the total emissions of DPM and NOx from Port sources. Ex. 268, "CAAP Overview."

D. Environmental and Community Group Opposition to Port Expansion

36. As a result of the health risks and environmental impacts caused by Port-related sources, environmental and community groups mobilized to oppose Port expansion projects. Such opposition blocked a series of expansion projects at the Port from 2001-2008. Apr. 27 Tr. (Freeman) at 45-48; *see also* Ex. 270, "Malnic Article"; Ex. 272-273, "Sahagun Articles."

37. In May 2001, the Port entered into an agreement with China Shipping Line Company ("China Shipping") by which the Port would construct and China Shipping would lease a new container terminal facility at POLA. *See* Ex. 270, "Malnic Article"; Ex. 271, "Schoch Article."

38. The Natural Resources Defense Council, the Coalition for Clean Air, and certain community groups (collectively, "NRDC") subsequently filed a lawsuit seeking a writ of mandate in the Los Angeles County Superior Court alleging that the Port had failed to comply with the requirements of the California Environmental Quality Act ("CEQA") with respect to the China Shipping terminal. *See* Ex. 270, "Malnic Article."

39. On October 30, 2002, the Second District Court of Appeal found that the Port had not complied with CEQA's requirements before entering into the agreement with China Shipping. The Second District Court of Appeal also enjoined further construction at the terminal. *NRDC v. City of Los Angeles*, 103 Cal. App. 4th 268, 126 Cal. Rptr. 2d 615 (Cal. Dist. Ct. App. 2002).

40. The Port and NRDC reached a settlement in March 2003, which enabled the Port to proceed with the China Shipping expansion project subject to a number of mitigation measures. Ex. 271, "Schoch Article"; Ex. 351, "Staff Recommendation, Resolution No. 09-6743."

41. Under the China Shipping settlement, the Port was required to establish a special fund for mitigation of air quality and aesthetic impacts in the

community due to the new terminal. POLA also committed to extensive equipment modifications in the terminal as well as requiring ships to turn off ship engines and switch to shore-side electrical power when docked, a process called "cold ironing." The settlement ultimately cost the Port more than $80 million. Funds for the settlement of the China Shipping litigation came entirely from Port revenue, without contributions from either the City of Los Angeles or China Shipping. Ex. 271, "Schoch Article"; Ex. 351, "Staff Recommendation, Resolution No. 09-6743."

42. Following the China Shipping settlement, POLA resolved to address air quality and environmental issues related to goods movement at the Port and adopted a "green growth" strategy. Apr. 27 Tr. (Freeman) at 45-48; Ex. 273, "Sahagun Article."

43. Subsequent to the China Shipping settlement, the Port continued to face pressure from the surrounding community and environmental groups such as NRDC in connection with proposed development projects that could result in higher levels of pollution. Apr. 27 Tr. (Freeman) at 45-48; Ex. 272-273, "Sahagun Articles."

44. The Port faced opposition from the NRDC regarding its proposed expansion of the TraPac terminal. In December 2007, the Board of Harbor Commissioners approved plans to expand the TraPac terminal at the Port to 243 acres from 176, to add on-dock rail facilities, and to reconfigure area roadways to better accommodate additional traffic. Ex. 273, "Sahagun Article"; Ex. 349, "EIR for China Shipping, TraPac, and Pier 400 Projects."

45. The Port considered the expansion of the TraPac terminal to be critical because TraPac's customers, Asian shipping lines, had begun using a new generation of larger container ships, which could not be accommodated at TraPac's facilities as configured. In the summer of 2007, three Asian shipping lines that regularly sent approximately 12,000 cargo containers per month through the TraPac terminal announced plans to take their business to the Port of Long Beach. This decision represented a significant revenue loss for both TraPac and the Port. Apr. 27 Tr. (Freeman) at 75-76.

46. Following the Board of Harbor Comissioners' approval of the plans for the TraPac terminal, NRDC filed an appeal with the Los Angeles City Council seeking to reverse the Board of Harbor Comissioners' decision and indicated it was willing to initiate a lawsuit to prevent the TraPac terminal expansion. Apr. 27 Tr. (Freeman) at 75-76.

47. In April 2008, the Port and the coalition averted litigation through an agreement which would permit the TraPac expansion project to go forward. As part of the agreement, the Port agreed to fund a study of off-Port impacts on health and land use in the communities of San Pedro and Wilmington and also agreed to establish a five-year mitigation fund to offset the environmental impact of the TraPac terminal expansion. Apr. 27 Tr. (Freeman) at 75-76; Ex. 352, "TraPac MOU with POLA."

48. In August 2009, the Board of Harbor Commissioners approved a 30-year lease with TraPac. The terminal expansion project will expand and modernize the TraPac terminal, allowing it to

more than double its container-handling capacity. Apr. 27 Tr. (Freeman) at 75-76.

49. The TraPac expansion is projected to generate hundreds of new terminal jobs, thousands of construction jobs at the peak of construction, and ultimately, as many as 5,400 regional jobs annually associated with terminal operations. *Id.*; Ex. 273, "Sahagun Article."

E. The Port's Clean Air Action Plan and Clean Truck Program

50. In response to the air quality and environmental concerns that had halted Port expansion projects between 2001-2008, the respective Board of Harbor Comissioners of POLA and the Port of Long Beach adopted a joint Clean Air Action Plan ("CAAP") in November 2006, and directed their staffs to develop specific measures to reduce emissions related to Port operations, including emissions from heavily polluting trucks. The Ports announced the CAAP in the San Pedro Bay Ports Clean Air Action Plan Technical Report ("CAAP Report"). Ex. 264, "CAAP Report."

51. The Ports stated in the CAAP Report that: "The Ports recognize that their ability to accommodate the projected growth in trade will depend upon their ability to address adverse environmental impacts (and, in particular, air quality impacts) that result from such trade. The [CAAP] is designed to develop mitigation measures and incentive programs necessary to reduce health risks while allowing port development to continue." Ex. 264, "CAAP Report."

52. The CAAP Report recognized that trucks were a significant source of air pollution and called for the rapid replacement or retrofitting of the entire drayage truck fleet serving the Port-over 16,000 trucks-within a five-year period. As one of a number of potential set of measures towards that goal, the CAAP Report cited the possibility that the Ports would purchase trucks and hire drivers to work at the Ports. Ex. 264, "CAAP Report."

53. Following adoption of the CAAP, from November 2006 through February 2008, the two Ports worked together to develop the Clean Truck Program, holding many public meetings, stakeholder meetings, and workshops, including consultant presentations, to gather different ideas for possible implementation. *See* Apr. 27 Tr. (Freeman).

54. As part of the Clean Truck Program development process, the Port retained various consultants. The Port retained John E. Husing to conduct an economic analysis of the proposed Clean Truck Program. Mr. Husing prepared a presentation dated September 5, 2007, and a report dated September 7, 2007 ("Husing Report"). The Port also retained the Boston Consulting Group ("BCG") to prepare an analysis of various options for implementation of the Clean Truck Program. BCG prepared a report that was released in March 2008 ("BCG Report"). Ex. 183, "Husing Report"; Ex. 191, "BCG Report ."

55. The Husing Report concluded that:

> At its core, the Clean Truck Program is designed to reduce air emissions in a timely fashion yielding an economic benefit to the community of

> $4.7 to $5.9 billion due to a reduction in premature deaths, loss of work and fewer medical problems. Some 95% of this benefit will come from 230-1,450 people not dying. With the program in place, the ports will be in a position to get their infrastructure plans approved. This will allow them to expand to their 42.5 million TEU capacity by the period 2020-2030. The result will be the ability of the ports to support 300,000 to 600,000 new jobs that would be lost if that infrastructure cannot be built. Unfortunately, there is a cost of attaining these goals. That will be the closure of some [licensed motor carriers] and the loss of some of the non-driving jobs and small businesses involved with them, as well as the closing off of port drayage as a route to upward mobility for some workers. It is the type of choice that has led to the expression, "there is no such thing as a free lunch."

Ex. 183, "Husing Report."

56. The Husing Report found that in the Port's drayage industry, the "intensive competition, plus lack of [motor carrier] pricing power, has resulted in an industry in which neither the typical LMCs nor the average [independent owner-operators] are particularly profitable." Ex. 183, "Husing Report," at 24.

57. Specifically, the Husing Report estimated that the cost to motor carriers of complying with the off-street parking requirement would average $21,237 per truck, and concluded that the cost of using employee drivers would "be 167% higher than the cost of using today's [independent owner-operators]."

In aggregate, the report concluded that drayage services prices would need to increase by 80 percent to cover cost increases, including the cost of higher driver costs, truck purchases, and off-street parking. Ex. 183, "Husing Report," at 70, 73.

58. The March 2008 BCG report, which was presented to the Board of Harbor Commissioners, considered various options and determined that the proposed Concession Agreement, including the employee driver requirement, was the most likely to provide sustainable environmental, safety and security, and operational gains. The BCG Report stated that its Clean Truck Program Option III, which included the requirement for employee drivers, would add a $500 million annual operating cost to the cost of Port drayage, compared to an option without such a requirement. BCG also set out an Option II, "Enhanced Model with Market Incentives," under which POLA would adopt incentives and funding priorities "that should create market conditions to encourage the evolution" of the drayage market to meet POLA objectives, but without an employee driver provision. However, BCG concluded that the benefits from Option II would not be as great as from Option III. Ex. 191, "BCG Report," at 80.

59. Port staff subsequently prepared recommendations setting forth the proposed Clean Truck Program for Board review and approval. Ex. 141, "Staff Recommendation, CAAP."

60. Port staff's recommendations concerning the Clean Truck Program were adopted by the Board of Harbor Commissioners in public meetings that took

place on November 1, 2007, December 20, 2007, March 20, 2008, and May 15, 2008, pursuant to its authority under the City Charter. POLA also, pursuant to authority granted by the Board of Harbor Commissioners, provided instructions and additional details of the Program to the public to facilitate its implementation. Ex. 128, "BHC Meeting Minutes, 3/20/08"; Ex. 139, "BHC Meeting Minutes, 5/15/08"; Ex. 238, "BHC Meeting Minutes, 11/1/07"; Ex. 240 "Agenda for BHC Meeting, 12/20/07"; Ex. 243 "BHC Meeting Minutes, 12/20/07."

61. The first part of the Program, approved in November 2007, took the form of an amendment to Tariff No. 4 ("Tariff"). The Tariff sets forth the basic terms upon which POLA does business as a port. The amendment adopted a progressive ban on polluting trucks (the "Truck Ban").[5] Ex. 238 ("BHC Meeting Minutes, 11/1/07"); Ex. 177, "Port of Los Angeles Harbor Tariff No. 4, Section 20"; Ex. 188, "Port of Los Angeles Harbor Tariff No. 4, Sections 2 and 20."

62. Under the Truck Ban, as of October 1, 2008, all pre-1989 trucks were banned from entering the Port. The Truck Ban then banned 1989-1993 trucks from entering the Port as of January 1, 2010, in addition

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[5] The Harbor Department issues Harbor Tariffs that establish rules, regulations, and fees for the use of POLA. These regulations are approved by the Board of Harbor Commissioners, and, if not emergency measures, become effective after ratification by Ordinances of the City of Los Angeles. City of Los Angeles Charter § 653. The Harbor Tariffs are penally enforceable. Harbor Tariff No. 4, Section 2, Item 220(b).

to 1994-2003 trucks that had not been retrofitted. On January 1, 2012, all trucks that do not meet the 2007 Federal Clean Truck Emissions Standards will be banned from the Port. *Id.*

63. At the Board of Harbor Commissioners' December 20, 2007 meeting, the Board established that MTOs must collect a $35.00 fee per loaded, twenty-foot container and $70.00 for each forty-foot or larger container hauled through a terminal gate by an older truck ("Clean Truck Fee") as an additional piece of the Program. Ex. 243, "BHC Meeting Minutes, 12/20/07."

64. The second part of the Program, approved by the Board of Harbor Commissioners on March 20, 2008, set forth POLA's intention to require concessions in principle and authorized in principle a series of grants and subsidies to encourage POLA's motor carriers to replace or retrofit older, dirtier trucks to 2007 emissions standards. The contemplated concession plan included a requirement that motor carriers wishing to provide drayage services at the Port must become concessionaires at the Port and agree to certain terms of performance, including a requirement that drivers be employees. The requirement created a direct contractual relationship between the Port and the motor carriers performing drayage services for the Port. Ex. 128, "BHC Meeting Minutes, 3/20/08."

65. Prior to October 1, 2008 (the effective date of the Concession requirement) it was not necessary to enter into any contracts or leases with POLA to provide drayage of containers.

F. Adoption of the Concession Agreement Requirement

66. POLA staff's March 12, 2008 and May 6, 2008 recommendations, which the Board of Harbor Commissioners approved, explained the safety and security benefits of the Concession Agreement with the employee driver provision. Ex. 141, "Staff Recommendations, 5/6/08"; Ex. 224, "Staff Recommendations, 3/12/08."

67. Based on Port staff's recommendations, the Board determined that requiring drayage trucks serving the Port to be registered under a Concession Agreement would best serve the Port's proprietary objectives of cleaner air, enhanced safety and security, and a reliable workforce. Ex. 245, "Ordinance No. 17981."

68. In Spring 2008, the Board made specific findings regarding the serious safety and security problems associated with drayage trucks at the Port. The Board also made findings that the Port's air quality and security and safety goals would be best served by requiring that motor carriers performing drayage services at the Port under a Concession Agreement ("concessionaires") use employee drivers. Ex. 184, "BHC Order No. 6956"; Ex. 245, "Ordinance No. 17981."

69. The March 30, 2008 Opinion of the President of the Board of Harbor Commissioners, adopted as the opinion of the entire Board, set forth the reasons for the Board's adoption of the Clean Truck Program, including its environmental, security, and reliable

workforce goals. Ex. 128, "BHC Meeting Minutes, 3/20/08."

70. BHC Order No. 6956 and Los Angeles Ordinance No. 179981 (adopted by the Board of Harbor Commissioners and approved by the Los Angeles City Council), found that, as neighbor to millions of Californians, the Port required the support of residents in neighboring communities for needed improvements in Port infrastructure. Order No. 6956 and Ordinance No. 179981 found that failure to significantly reduce the health and traffic impacts of Port operations on these communities would impede the Port's ability to handle increased volumes of goods in the future. Order No. 6956 and Ordinance No. 179981 also cited concerns regarding vehicle safety (including vehicle maintenance, repair and replacement, and driver safety) and security (including reported cases of drivers presenting false credentials and counterfeit licenses to gain access to Port terminals) as motivations for the adoption of the Clean Truck Program and Concession Agreement. Ex. 184, "BHC Order No. 6956"; Ex. 245, "Ordinance No. 17981."

71. BHC Order No. 6956 sets forth the Board of Harbor Commissioners' concern that drivers with low incomes would lack the ability to properly maintain their trucks, thereby having a "negative effect on both the vehicle safety, as well as the air emissions performance of vehicle engines and retrofits." Ex. 184, "BHC Order No. 6956."

72. BHC Order No. 6956 states: "The Port drayage services business is highly competitive .... As a result, the Board seeks to encourage evolution of the

Port drayage market towards an asset-based market in which Licensed Motor Carriers that hold the motor carrier concessions also own the truck assets used to perform under the concession." Ex. 184, "BHC Order No. 6956."

73. BHC Resolution 6522 states: "Serious and long-standing problems exist as a consequence of the inadequate maintenance of the heavy duty trucks conducting Port drayage.... Inadequate truck maintenance currently contributes to significant amounts of unnecessary emissions of air pollutants from drayage trucks while in operation on Port property. The proper maintenance of truck air pollution control equipment will continue to be necessary to achieving the Port's clean air goals even after actions that the Port will take to replace older drayage trucks with newer, cleaner trucks and to retrofit trucks with emissions control devices.... The Board also intends to protect the value of the Port's investments in Clean Trucks and in retrofit equipment, and finds that it can better protect such investments by (i) imposing maintenance and record-keeping requirements directly upon Concession motor carriers ...." Ex. 185, "BHC Order No. 6522."

74. According to the Board of Harbor Commissioners: "The Port needs to maintain political support and goodwill from the people living in surrounding communities.... The Board therefore finds it necessary and desirable ... to require that Concessionaires provide parking facilities which are adequate to allow parking for its Drayage Trucks when not in service." Ex. 185, "BHC Order No. 6522." Further, the off-street parking requirement "will

address a problem raised by the community, i.e., heavy duty trucks parking in and driving through residential areas around the Port." Ex. 224, "Approved POLA Staff Recommendations to BHC, 3/12/08."

75. BHC Resolution 6522 found that serious safety and security problems existed in connection with drayage trucks at the Port. In particular, the Board of Harbor Commissioners cited statistics provided by Long Beach finding that, although heavy-duty vehicles accounted for about 21.3% of the vehicles present in the Long Beach Harbor District during the period January 1, 2005 through March 10, 2007, they accounted for 32.5% of traffic violations, 25.7% of accidents, and 81.7% of citations for improper maintenance. Ex. 185, "BHC Order No. 6522."

76. BHC Resolution 6522 also found that the Port lacked a readily accessible and reliable source that would provide identities and other personal information of truck drivers who have access to Port property. In particular, the Board of Harbor Commissioners stated that a significant proportion of drivers who were then driving trucks on Port property appeared to lack valid (1) documents to establish personal identity; (2) documents establishing permission to work or conduct business in the United States; and/or (3) proper driver licenses. The Board of Harbor Commissioners noted that the Port at the time lacked any reliable and practical method of enforcing driver requirements against individual truck drivers, and that, rather than enforcing requirements against individual drivers, it would be more practical and effective to

require that motor carriers be responsible for enforcing such requirements on their drivers. Ex. 185, "BHC Order No. 6522."

77. BHC Resolution 6522 stated the Board of Harbor Commissioners' finding that "[a] Port drayage truck driver workforce comprised of more drivers assigned specifically to drayage at the Port would ... improve overall drayage truck safety." Ex. 185, "BHC Order No. 6522."

78. BHC Resolution 6522 states the Board of Harbor Commissioners' finding that "safety hazards" caused by "truck traffic through the nearby neighborhoods ... would be substantially reduced if drayage trucks serving the Ports were required to park in designated truck parking areas that are physically separated from residential areas." Ex. 185, "BHC Order No. 6522."

79. The Board of Harbor Commissioners concluded, in its formal Resolution adopting the Concession program, that a Concession mechanism based on a employee-driver based business model would transform the market for drayage services into a "market characterized by the presence of fewer, generally larger, and more stable LMCs." Ex. 185, "BHC Order No. 6522."

80. In her March 20, 2008 presentation to the Board of Harbor Commissioners recommending adoption of the Concession mechanism, POLA's executive director wrote that under the proposed mechanism, "Total diversion [of container movements] will be approximately 3% based on rational economic decisions resulting from drayage price increases....

Drayage price increases especially due to labor changes.... Asset-based LMCs with 100% employees creates barriers to entry." Ex. 225, "Exec. Director's Presentation to BHC, 3/20/08."

81. The Opinion of then Board of Harbor Commissioners President David Freeman states POLA's objectives in adopting the Concession program: "It is beyond debate that the existing system does not meet critical needs of the Port as a proprietor in three fundamental, crucial public interest needs: 1) cleaner air; 2) homeland security; and 3) a reliable work force that can implement needs 1) and 2)." Ex. 128, "BHC Meeting Minutes, 3/20/10." The president's Opinion was adopted as the Opinion of the Entire Commission. *Id.*

G. POLA's Concession Agreement Requirements

82. The Board of Harbor Commissioners approved a form Concession Agreement contract on May 15, 2008, although this version was subsequently amended by formal Board action. Ex. 139, "BHC Meeting Minutes, 5/15/10."

83. Subsequently, in 2008 and 2009, POLA implemented various funding and incentive programs to help motor carriers procure clean trucks.

84. A 2008 incentive program attracted 2,200 privately-financed trucks meeting 2007 EPA emission standards to POLA and the Port of Long Beach, at a total cost to POLA of approximately $44 million. To qualify for POLA's incentive program,

trucks had to be privately funded and be committed to make a minimum of 300 trips per year at POLA for a period of five years. Ex. 231, "Press Release, 10/1/09"; Ex. 235, "Press Release 10/1/09."

85. POLA also provided grants for the purchase of new 2007-compliant trucks to be used at the Port. It is estimated that the grant program, which includes $12.5 million in Port funds, resulted in approximately 1,300 clean trucks being put into drayage service at the Port. Ex. 261, "Resolution 09-6845."

86. It is estimated that POLA helped to fund, through incentives and grants, approximately 35 percent of the drayage fleet that will serve the Port in 2010-a percentage that is in fact likely to increase.

87. However, as of the fall of 2009, approximately 3,000 of the 5,500 clean trucks serving POLA were purchased without any subsidy from POLA, the Port of Long Beach, the SCAQMD, or the California Air Resources Board. Ex. 231, "Press Release, 10/1/09"; Ex. 235, "Press Release 10/1/09."

88. POLA also participated in a truck "preorder" program with the Port of Long Beach, under which the Ports negotiated with truck original equipment manufacturers and dealers to order and make available, for purchase by drayage truck owners operating at POLA and the Port of Long Beach, 2007-compliant trucks at volume-discounted prices. Ex. 256, "Resolution 08-6569"; Ex. 299, "Staff Recommendation, Resolution No.08-6569."

89. Also, in a joint initiative with the South Coast Air Quality Management District, the Port invested more than $1 million in developing an electric truck manufactured by Balqon Corporation for use in port drayage. The Port itself purchased 25 electric trucks from Balqon, at least five of which are expected to be placed into drayage service at the Port. Ex. 279, "White Article"; Ex. 301, "Staff Recommendation, "Resolution No.09-6742"; Ex. 304, "Agreement 266."

90. On November 19, 2009, the U.S. Surface Transportation Board ("STB") approved an equipment pooling agreement between 10 drayage carriers serving POLA and the Port of Long Beach "that use either employee drivers or independent contractors to operate their own vehicles, including clean trucks," so that they could share 626 carrier-funded trucks meeting the Ports' environmental standards. The STB found that the pooling agreement "would give ... smaller and mid-sized motor carriers greater access to clean trucks" and "serves the interest of better service to the public and efficiency of operation." Ex. 192, "Surface Transportation Board Decision, 11/19/09."

91. POLA's Concession Agreement contract requirement applies only to drayage service, and not to any of the many other services (e.g., stevedoring, rail transportation, marine terminal operation) needed for the Port's operations. Ex. 181, "POLA Concession Agreement."

92. It is undisputed that POLA's Concession Agreement requirements are directed only to motor carriers seeking to provide drayage services on trust land granted by the State. *Id.*

93. Prices charged by motor carriers performing drayage at POLA have not risen as a result of the concession contract requirement. Motor carriers continue to provide drayage services at POLA despite the concession contract requirement, and they have not changed the services they provide to customers as a result of the concession contract requirement. Ex. 176, "Holmes Decl."

H. Safety and Security Relating to Drayage Trucking at the Port

94. The Department of Homeland Security ("DHS") considers POLA and the Port of Long Beach to be one of seven port areas considered to be "Group I" port areas at the highest risk of terrorist attack. Ex. 266, "Dep't of Homeland Security, FY 2009 Overview."

95. It is undisputed that the Port plays a significant role in ensuring safety and security on Port property. POLA is responsible for security functions that protect terminal facilities. Two POLA Port Police boats patrol the Port's waterside. POLA also conducts waterside surveillance to detect the presence of potential threats. POLA has responsibility for safety and security with respect to geographical portions of the Port that are not leased to Marine Terminal Operators.

96. POLA works jointly with various federal, state, and local agencies to secure the Port, including through the Central California Area Maritime Security Committee. POLA also has Memoranda of Understanding with Customs and Border Control and the United States Coast Guard for jointly protecting the Port. Ex. 286, "Area Maritime

Security Committee Charter"; Ex. 288, "MOI Between the City of Los Angeles and U.S. Customs and Border Protection"; Ex. 289, "MOI Between the City of Los Angeles and U.S. Coast Guard."

97. In order to implement its safety and security initiatives, POLA applies for federal and state security grants. Through the first nine months of 2009, the Federal Government provided POLA with about $55 million in security grants, and the California Government provided POLA with about $26 million in security grants. Ex. 287, "POLA Federal and State Port Security Grants."

98. It is undisputed that prior to the Clean Truck Program, POLA had no system for (1) collecting information identifying the driver, the truck, the cargo, and the responsible company for each truck entering POLA's terminals; (2) correlating each piece of information with other pieces of information relating to a given truck visit; and (3) making one entity, the Licensed motor carrier, responsible for providing such information and verifying its accuracy. Ex. 176, "Holmes Decl."

99. In the course of the development of the Clean Truck Program, the Port commissioned studies that identified the approximately 16,000 heavy drayage trucks being driven in and out of the Port by unknown and unidentified drivers as a key security vulnerability. Ex. 139, "BHC Meeting Minutes, 5/15/08"; Ex. 176, "Holmes Decl."

100. It is undisputed that in one instance, the Port learned that a particular driver's license number was reported 46 times through a terminal gate in a single

day, representing 23 trips to/from the Port. The Port estimated that this number was approximately five times what would be typical for a single driver and thus likely resulted from several drivers using the same false identification.

101. POLA requires that placards only contain a telephone number for reporting concerns regarding truck emissions, safety, and compliance. Ex. 181 ¶ III(l), "POLA Concession Agreement."

I. The Local Benefits of the Clean Truck Program

102. In its first year, the Clean Truck Program reduced the rate of Port truck emissions by an estimated 70 percent. It is expected that, by 2012, Port truck emissions will be reduced by more than 80 percent. Ex. 217, "Holmes and Knatz Memorandum, 11/12/09"; Ex. 231, "Press Release, 1/01/09."

103. In a June 2009 presentation to the U.S. Conference of Mayors, Mayor Villaraigosa stated that the POLA Clean Truck Program "[c]ost less with greater economic benefit than expected." In particular, POLA was "bearing approximately 10% of program total cost, instead of anticipated 80% prior to implementation. $44 million in port incentives have leveraged over $400 million in private investment." Ex. 144, "Villaraigosa Presentation, 6/13/09 ."

104. On October 1, 2009, Geraldine Knatz, Executive Director of POLA, declared "If ever there were a win-win air pollution initiative at our Port, the Clean Truck Program is it ... [t]he air is substantially

cleaner and continues to improve. Industry is responding by purchasing clean trucks and taking advantage of our incentive program. The trucking industry and our terminal operators have especially been instrumental in the success of this program, and the dollars generated in the purchase of all these news trucks are an added investment into the Southern California economy." Ex. 231, "Press Release, 1/01/09."

105. According to statements issued by POLA, POLA officials estimate that by spring 2010 there would be between 6,500 and 7,000 trucks serving the ports that meet or exceed the U.S. Environmental Protection Agency 2007 heavy duty truck emissions standards. These trucks were expected to make more than 90 percent of container pick-ups and drop-offs in early 2010. This success was achieved while this Court's preliminary injunction against several provisions of the Concession agreements was in effect. Ex. 232, "Press Release, 1/01/09."

III. CONCLUSIONS OF LAW

A. Jurisdiction and Venue

This action arises under the Constitution and Laws of the United States, including the Supremacy Clause of the Constitution, Article VI, clause 2; the Commerce Clause of the Constitution, Article I, Section 8, Clause 3; the FAAA Act, and as re-enacted by the Interstate Commerce Commission Termination Act of 1995, Public Law 105-88, as amended, (49 U.S.C. §§ 14501(c), 14504a(c), 14506); 42 U.S.C. § 1983; and the All Writs Act, 28 U.S.C. § 1651. Accordingly, this Court has jurisdiction under

28 U.S.C. § 1331 (federal question) and 28 U.S.C § 2201 (declaratory judgment). This proceeding for declaratory and injunctive relief, damages, and attorney's fees presents an actual case and controversy within the Court's jurisdiction.

Venue is proper in this district under 28 U.S.C. § 1391(b). The claims asserted in the complaint are based on conduct occurring in this district and each of the defendants maintains its offices and performs its duties within this district.

B. ATA Has Associational Standing to Bring This Action

"[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *see also National Ass'n for Advancement of Colored People v. Ameriquest Mortg. Co.*, 635 F. Supp. 2d 1096, 1101-02 (C.D. Cal. 2009).

ATA meets these requirements: ATA's members include licensed drayage motor carriers that would have standing to sue POLA on their own behalf; among the central purposes of ATA and its Intermodal Motor Carriers Conference are the protection of its members with respect to governmental regulation of prices, routes, and services; and the claim for constitutional violations

and the requested relief do not require participation of individual ATA members as parties, inasmuch as ATA seeks only injunctive relief. *See Warth v. Seldin*, 422 U.S. 490, 515 (1975) (holding that injunctive relief will "inure to the benefit of those members of the association actually injured"). Therefore, ATA has established its standing to sue on behalf of its membership.

C. Preemption by the Supremacy Clause and the FAAA Act

1. Statutory Basis for Preemption

ATA argues that the Concession Agreement provisions at issue are preempted by the FAAA Act. "Federal preemption occurs when: (1) Congress enacts a statute that explicitly preempts state law; (2) state law actually conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude the Congress left no room for state regulation in that field." *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1045-46 (9th Cir. 2000), abrogated on other grounds, *Tillison v. City of San Diego*, 406 F.3d 1126, 1127 (9th Cir. 2005). When a statute provides a reliable indication that Congress intended to preempt state and local regulation, "the scope of federal preemption is determined by the statute." *Id.* at 1046.

2. Preemption by 49 U.S.C. § 14501(c)(1)

Congress enacted the FAAA Act to achieve deregulation of the motor carrier industry, and therefore, included a "broad preemption statute." *Id.* The statute provides that, with regard to motor

carriers, "a State, political subdivision of a State, or political authority of two or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1). Therefore, for a state regulation to be preempted under 49 U.S.C. § 14501(c)(1), the regulation must be "related to the price, route, or service of a motor carrier that transports property." *Toucher*, 219 F.3d at 1047. Relation to price, route, or service is found where "the regulation has more than an indirect, remote, or tenuous effect on the motor carrier's prices, routes, or services." *Id.*

Congress' overarching goal in enacting the FAAA Act was to "help[ ] assure transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices,' as well as 'variety' and 'quality.'" *Rowe v. N. Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)). Even if the law at issue does not directly regulate motor carriers, but the effect of the regulation would be that carriers would have to offer different services than what the market would otherwise dictate or "freeze into place services that carriers might prefer to discontinue in the future," the regulation at issue has a sufficient effect on carrier services for preemption to apply. *See Rowe*, 552 U.S. at 371-72 (finding that federal law preempts a Maine statute that forbids licensed tobacco retailers to employ a delivery service unless that service follows particular delivery procedures, because "the effect of the regulation is that carriers will have to offer tobacco

delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate").

Because the Court may sever the preempted provisions from the Concession Agreement, the Court considers in turn each provision at issue to determine whether each may be subject to preemption because it is "related to the price, route, or service of a motor carrier."[6] *See Am. Trucking II*,

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[6] While ATA argues that the Concession Agreement "*per se*" affects routes and services by prohibiting non-Concessionaire motor carriers from providing drayage services to and from marine terminals at POLA, the Ninth Circuit's opinion in *Air Transp. Ass'n of Am. v. San Francisco*, 266 F.3d 1064, 1073-74 (9th Cir. 2001), appears to preclude a finding that the Concession Agreement has a per se effect on "routes" and "services." Similar to the FAAA Act, the Airline Deregulation Act provides that state and local governments "may not enact or enforce a law, regulation, or other provision having the force and effect of law relating to price, route, or service of an air carrier." 49 U.S.C. § 41713(b) (1). In *Air Transport*, the plaintiffs argued that a San Francisco ordinance requiring airlines that serve the San Francisco International Airport ("SFO") to comply with certain nondiscrimination provisions impermissibly affected airlines' routes and services because if the airlines did not comply with the provisions, they would not be able to fly to or from SFO. 266 F.3d at 1074. However, the Ninth Circuit rejected this argument, finding that while "the Airlines will have to agree to abide by the Ordinance's nondiscrimination requirements as a 'cost' of maintaining their leases at SFO," the ordinance did not "compel[ ] or bind[ ] [the Airlines] to a particular price, route or service." *Id.* ("The question is not is not whether the Ordinance compels or binds them into not discriminating; the question is whether the Ordinance compels or binds them to a particular price, route, or service."). Similarly, in the present action, the motor carriers continue to be free-as they were before the adoption of the Clean Truck Program-to decide whether to perform drayage

596 F.3d at 607 ("We affirm the district court's decision to sever the preempted provisions of the concession agreements."); *see, e.g., New Hampshire Motor Transp. Ass'n v. Rowe*, 377 F. Supp. 2d 197, 210-16 (D. Me. 2005) (analyzing each of three provisions under the FAAA Act individually, and finding two of the three to be preempted under section 14501(c)); *Prof. Towing & Recovery Operators of Ill. v. Box*, No. 08-4096, 2008 WL 5211192, at *9 n. 7 (N.D. Ill. Dec.11, 2008).

a. The Employee Driver Provision

The evidence shows that the employee driver provision would affect motor carrier's routes or services, by prohibiting trucks driven by independent owner-operators from providing drayage services to and from marine terminals at POLA. *See Toucher*, 219 F.3d at 1047. Furthermore, the record demonstrates that the employee driver provision would significantly affect costs of drayage services. Ex. 183, "Husing Report," at 70-73; Ex. 191 (concluding that the employee driver provision would increase drayage operational costs by 167%); Ex. 191, "BCG Report," at 80 (estimating that the employee driver provision would add an estimated $500 million to the annual operating costs of Port drayage). It is further estimated that drayage services prices thus would need to increase, in part because of the employee driver provision. Ex. 183, "Husing Report," at 70-73; *see also* Ex. 225, "POLA Executive Director's Presentation to the BHC,"

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services at the Port, but a decision not to do so does not, under *Air Transport*, affect their "routes" or "services."

(forecasting that drayage services pricing would increase "especially due to labor changes"). Therefore, the evidence shows that at least some of the increased costs of drayage services caused by the employee driver provision will impact drayage pricing, causing it to increase. Accordingly, the Court finds that 49 U.S.C. § 14501(c)(1) preempts the employee driver provision, unless POLA demonstrates that an exception to preemption applies.

b. The Off-Street Parking Provision

The evidence in the record shows that the off-street parking requirement would probably affect motor carriers' prices, routes, or services. *See Toucher*, 219 F.3d at 1047. While at least two of ATA's local motor carrier witnesses already provide off-street parking for trucks operating under their authority (Apr. 21 Tr. at 178:18-25 (Owen); Apr. 22 Tr. at 153:24-154:1 (Johring)), the record indicates significant increased costs to motor carriers associated with parking off the street. *See* Apr. 21 Tr. at 179:1-11 (Owen) (testifying that the use of property for parking purposes would constitute a lost opportunity for revenue generation for motor carriers); Ex. 183, "Husing Report," at 70-73 (estimating that the cost to motor carriers of complying with the offstreet parking requirement would average $21,237 per truck).[7] Because motor carriers would likely incur high costs to obtain off-street parking for trucks, and because they already operate quite leanly, these

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[7] While the Husing Report is not clear, it appears that this is an annual cost.

costs will likely be passed on to customers in the form of higher prices for drayage services. *See* Ex. 183, "Husing Report," at ii (finding that intense competition between the motor carriers results in average returns on their revenues of just 5%). Moreover, because this provision alters where motor carriers must locate their trucks between drayage movements, this implicates routes and services. Accordingly, this provision is preempted by 49 U.S.C. § 14501(c)(1).

c. The Maintenance Provision

The record contains no evidence that the maintenance provision would have "more than an indirect, remote, or tenuous effect on the motor carrier's prices, routes, or services." *See Toucher*, 219 F.3d at 1047. Indeed, several of ATA's licensed motor carrier witnesses have already prepared and submitted maintenance plans to the Port, and these witnesses testified that preparation of such plans did not take much time and did not give rise to any significant additional costs. *See* Apr. 22 Tr. at 13:10-18 (Owen); Apr. 22 Tr. at 155:2-13 (Johring). Moreover, licensed motor carriers are already responsible under federal regulations for the safety of all trucks operating under their authority, and thus this requirement should not have any additional effect on their prices, routes, or services. Apr. 20 Tr. at 207:10-25 (Sandberg); Apr. 21 Tr. at 181:4-18 (Owen). Accordingly, ATA has failed to show that the maintenance provision is preempted by 49 U.S.C. § 14501(c)(1).

d. The Placard Provision

ATA has put forth no evidence demonstrating how the requirement that trucks bear a placard containing an 800-number for the public to call would affect the prices, routes, or services of motor carriers. Accordingly, ATA has failed to show that the placard provision is preempted by 49 U.S.C. § 14501(c)(1).

e. The Financial Capability Provision

Testimony by ATA's licensed motor carrier witnesses concerning the financial capability provision indicates that the provision would have no effect on prices, routes, or services. *See* Apr. 21 Tr. at 185:8-15 (Owen) (testifying that the requirement would have no adverse impact on licensed motor carrier's business operations); Apr. 22 Tr. at 51:8-22 (Patterson). Accordingly, ATA has failed to show that the financial capability provision is preempted by 49 U.S.C. § 14501(c)(1).

3. Exceptions to Preemption

POLA contends that even if ATA can show that 49 U.S.C. § 14501(c) (1) would function to preempt any of the Concession Agreement provisions at issue, the provisions are exempted from preemption for three reasons, each of which would be sufficient to defeat preemption. First, POLA argues that the provisions are exempt from preemption under the FAAA's statutory safety exception. Second, POLA posits that the provisions are not preempted because the Ports reside on sovereign tidelands, and Congress has not evinced an intent to deprive the states of their

sovereignty over these lands. Third, POLA argues that the provisions are not preempted by reason of the market participant exception to preemption. The Court finds that the safety exception functions to exempt some of the provisions at issue, the market participant exception exempts the Concession Agreement provisions entirely, and the tidelands exception is not applicable.

c. The Safety Exception

The provision of the FAAA preempting state regulation "related to the price, route, or service of a motor carrier that transports property," contains an express safety exception to preemption. *See* 49 U.S.C. § 145019(c). Specifically, this section provides that the preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." 49 U.S.C. § 14501(c)(2)(A).

The United States Supreme Court has held that, in order to fall within the safety exception, a statute, regulation, or provision must be "genuinely responsive to safety concerns." *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 442 (2002). In other words, a regulation does not fall under the safety exception if it is an economic regulation under the guise of a safety regulation. *Id.* The Supreme Court has also held that the

"narrowest possible construction of the exception" is "surely resistible," because the FAAA Act's preemption rule and the safety exception "do not necessarily conflict." *Ours Garage*, 536 U.S. at 441. Instead, the safety exception "seeks to save from preemption state power 'in a field which the States have traditionally occupied.' " *Id.*

In *Am. Trucking I*, 559 F.3d at 1054, the Ninth Circuit noted that there is "no bright line test for what is related to vehicle safety" and that the Court is required to ask whether the regulator was "acting out of safety concerns." *Id.*, citing *Tillison*, 406 F.3d at 1129. The Court held that "[i]t is not enough to say that the provision might enhance efficiency, or reduce some kind of negative health effects. The narrow question, again, is whether the provision is intended to be, and is, genuinely responsive to motor vehicle safety." *Id.* at 1055. The Court therefore stated that "even if some kind of general public health concerns are (or may be) involved in a statute or regulation ... that alone does not bring the regulation within the ambit of the motor vehicle safety exception." *Am. Trucking I*, 559 F.3d at 1054. Because the Court may sever the preempted provisions from the Concession Agreement, the Court considers in turn each provision at issue to determine whether each may fall within the ambit of the safety exception. *See Am. Trucking II*, 596 F.3d at 607.

i. The Employee Driver Provision

ATA argues that POLA was not acting out of safety concerns in enacting the employee driver provision of the Concession Agreement, and thus that it does not

fall within the ambit of the safety exception. The Ninth Circuit previously held that "the independent contractor phase-out provision is one highly likely to be shown to be preempted." *Am. Trucking I*, 559 F.3d at 1056. Specifically, the Ninth Circuit stated:

> the Port of Los Angeles Concession agreement mandates the phasing out of thousands of independent contractors (many or most of them small businessmen who own their own trucks). In an attempt to justify this, the Port argues that there are '[s]erious and longstanding safety problems' because of 'unsafe, negligent or reckless driving' that has subjected the Port to 'a risk of financial liability and moral culpability for failure to act to control actions by third parties.' Those concerns would allegedly be ameliorated because requiring employee drivers will provide 'control [to] the concessionaires as employers of their employee drivers to a degree not possible with casual or independent drivers.' We see little safety-related merit in those threadpaper arguments, which denigrate small businesses and insist that individuals should work for large employers or not at all. As it is, the record demonstrates that the Ports' primary concern was increasing efficiency and regulating the drayage market.

Id. at 1055-56.

On remand, this Court enjoined the provision, finding that "based on the holding of the Ninth Circuit, and because it appears that this provision is addressed to concerns unrelated to motor vehicle safety, the Court finds that ATA is likely to succeed

on the merits in showing that the provisions of the POLA Concession Agreement dealing with the independent operator phase-out are preempted under the FAAA Act, and do not fall within the scope of the safety exception." *Am. Trucking Ass'ns*, 2009 WL 1160212, at * 7. For the same reasons, the Court again finds that the provision does not fall within the safety exception.

ii. The Off-Street Parking Provision

The Ninth Circuit previously addressed this requirement, finding that:

> it is likely that the on-street parking ban in the Port of Los Angeles Concession Agreement is not genuinely responsive to safety. While restrictions on parking could be responsive to the safety of drivers and individuals in the surrounding neighborhoods in some sense (though it is not clear how), the Port of Los Angeles bans trucks from parking legally on streets where other trucks are free to park. Thus, any potential safety rationale for restricting on-street parking is seriously undermined, and it is likely that this provision would not withstand scrutiny.

Am. Trucking I, 559 F.3d at 1056-1057. On remand, this Court subsequently enjoined the provision, finding that "the parking provisions contained within the Concession agreements are insufficiently related to motor vehicle safety so as to fall within the safety exception." *Am. Trucking*, 2009 WL 1160212, at *10. While POLA puts forth some evidence that this provision is responsive to safety by removing trucks from residential streets where they may block sight

lines and make the neighborhoods less dangerous for children, the Court finds that the provision was predominantly enacted for community relations reasons, to mollify residents in the area surrounding the Port who were unhappy with the presence of a large number of trucks in their neighborhoods. *See* Apr. 23 Tr. at 103-105 (Holmes). Accordingly, the Court again concludes that the provision does not fall under the safety exception to the FAAA Act.

iii. The Maintenance Provision

This Court has previously found that the maintenance provision does not affect prices, routes, or services. However, even if the FAAA Act could be said to apply, the Court nonetheless concludes that the maintenance provision falls within the safety exception. While ATA argues that the maintenance provision does not fall within the ambit of the safety exception, this Court found to the contrary in its order dated April 28, 2009, because it "agree[d] with defendants that, while the[ ] provision[ ] may certainly be responsive to environmental concerns, [it is] also 'genuinely responsive to motor vehicle safety.' "[8] *Am. Trucking*, 2009 WL 1160212, at * 14 (citing *Am. Trucking I*, 559 F.3d at 1055). This Court further concluded that "[r]equiring routine truck maintenance will no doubt help to ensure that drayage trucks are operating properly and safely,

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[8] Even though this Court concluded, *supra*, that the maintenance, placard, and financial capability provisions do not affect the "price, route, or service" of motor carriers and thus that the provisions are not preempted by the FAAA, the Court still considers the question of whether they fall within the safety exception.

which will in turn likely prevent motor vehicle accidents." *Id.* The Court finds that at trial, the evidence put forth by POLA supported its prior conclusions, and thus the Court again concludes that this provision falls within the safety exception of the FAAA Act.

iv. The Placard Provision

This Court has previously found that the placard provision does not affect prices, routes, or services. However, even if the FAAA Act could be said to apply, the Court nonetheless concludes that the placard provision falls within the safety exception. In its order dated April 28, 2009, this Court found that "[t]he primary motivation behind the placards does appear to be motor vehicle safety, in that it provides a mechanism for individuals-including other operators of trucks accessing the Ports-to report unsafe driving or other dangerous activity to the proper authorities." *Am. Trucking*, 2009 WL 1160212, at * 17. While the Ninth Circuit later vacated this ruling and remanded in order for this Court to consider the preemptive effect of 49 U.S.C. § 14506(a), the Court *infra*, finds that this statute does not preempt the placard requirement. *See Am. Trucking II*, 596 F.3d at 606. Furthermore, the Court finds that the evidence at trial demonstrates that the placard provision falls within the safety exception, as the placard "refers members of the public to a phone number to report concerns regarding truck ... safety ..." *See* Apr. 22 Tr. at 64-65 (Patterson); Ex. 326. The Court is not persuaded by ATA's argument that the public may become confused by the placard-and therefore safety would be compromised-if

multiple jurisdictions enacted similar requirements, as no witness was aware of any jurisdiction that had enacted such a requirement. *See* Apr. Tr. at 90-91 (Sandberg). Accordingly, the Court concludes that the provision falls within the ambit of the safety exception to the FAAA Act.

v. The Financial Capability Provision

As set forth above, the Court concludes that the financial capability provision does not affect prices, routes, or services. ATA disagrees, and further argues that the financial capability provision does not fall within the ambit of the safety exception. In *Am. Trucking I*, 559 F.3d at 1056, the Ninth Circuit agreed with ATA, stating:

> it is not likely that the financial disclosure requirements in both Ports' agreements could be justified under any conceivable safety rationale. Those provisions require disclosures of annual reports, SEC filings, balance sheets, income tax statements, and pending legal actions. The Ports make no effort to explain how a motor carrier's financial viability touches at all on the safety of the motor vehicle.

After the case was remanded, this Court enjoined the provision, finding that "[b]ased on the record before the Court, it cannot conclude that th[is] provision[is] likely to fall within the safety exception." *Am. Trucking*, 2009 WL 1160212, at *9. At trial the evidence demonstrated that the financial disclosure provision may have been enacted, in some part, due to safety considerations, in that a financially viable motor carrier may be less likely to cut corners

regarding safety out of economic necessity. *See* Apr. 23 Tr. at 116:16-117.7 (Holmes) (testifying that improper maintenance can lead to material safety deficiencies); Apr. 28 Tr. at 83 (Brown). However, the requirement appears primarily intended to ascertain that companies providing drayage services at the Port are financially stable, so that the Port can be certain that the companies have the means to maintain their trucks and the Port will not lose its investment in truck grants. *See* Apr. 23 Tr. at [illegible] (Holmes). Accordingly, after reviewing the evidence the Court concludes that, should the financial capability provision affect prices, routes, or services and thereby comes within the ambit of the FAAA Act, then this provision is not "genuinely responsive to safety concerns." *See City of Columbus*, 536 U.S. at 442. Thus it fails to fall within the safety exception to the FAAA Act. *Id.*

b. The Tidelands Exception

POLA contends that the Port sits on the sovereign tidelands of San Pedro Bay, and on that basis claims that the preemptive force of Section 14501(c)(1) does not apply to the Concession Agreement. However, a state's power over beds of navigable waters such as tidelands, "remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce." *Montana v. United States*, 450 U.S. 544, 551 (1981). Based on the Supreme Court's decision in *Montana*, this Court previously found that POLA's control over its tidelands "is not absolute .... Congress's power to regulate interstate commerce over navigable waterways supersedes the

state's plenary control." *Am. Trucking*, 577 F. Supp. 2d at 1119. Further, Ninth Circuit precedent contradicted POLA's theory where, as this Court observed, the Commerce Clause "preempted regulations by a state regarding leasing of sovereign tidelands." *Id.* (citing *Western Oil & Gas v. Cory*, 726 F.2d 1340, 1343 (9th Cir. 1984)). For these reasons, this Court previously held, and the Ninth Circuit affirmed, "that the fact that the Ports sit on sovereign tidelands does not exempt them from preemption under the" FAAA Act. *Id.*, *aff'd in part*, 559 F.3d at 1053. Because POLA has not presented any additional facts that bolster its theory, the Court concludes that the sovereign tidelands exception does not exempt the Concession Agreement from preemption under the FAAA Act.

b. The Market Participant Exception

POLA contends that the Port was acting as a proprietor-the owner of a business-when it enacted the Clean Truck Program, of which the Concession Agreement under challenge here is a part, and thus the market participant doctrine protects the Concession Agreement provisions against ATA's FAAA Act and Dormant Commerce Clause challenges. The market participant doctrine distinguishes between the role of the state or local government as a regulator and its role as a market participant.[9] *Engine Mfrs. Ass'n v. South Coast Air*

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[9] The doctrine originated in a series of Commerce Clause cases, starting with the Supreme Court's decision in *Hughes v. Alexandra Scrap Corp.*, 426 U.S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976). *See Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S. Ct. 2271, 65 L. Ed. 2d 244 (1980); *White v. Mass. Council of Constr.*

Quality Management Dist., 498 F.3d 1031, 1040-41 (9th Cir. 2007) ("Not all actions by state or local government entities ... constitute regulation, for such an entity, like a private person, may buy and sell or own and manage property in the marketplace."). In cases of statutory preemption, "the market participant doctrine is based on the proposition that 'pre-emption doctrines apply only to state *regulation*.'" *Id.* at 1040 (emphasis added). Therefore, if state action is *proprietary*, rather than regulatory, such action is not generally subject to statutory preemption. *Id.* Although the scope of the doctrine may vary depending on the federal statute at issue, "the Court will not 'infer' preemption of proprietary action unless Congress "indicat[es] ... that a State may not manage its own property when it pursues its purely proprietary interests." *Id.* at 1044.

The Ninth Circuit has held that state action qualifies as proprietary in either of two circumstances. "First, state action is proprietary if it 'essentially reflect[s] the [governmental] entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances.'" *Engine*

Employers, Inc., 460 U.S. 204, 103 S. Ct. 1042, 75 L. Ed. 2d 1 (1983). Since that time, the Supreme Court and circuit courts have applied the market participant doctrine to uphold state action that would otherwise be preempted by federal law so long as the action is proprietary rather than regulatory in nature. Importantly, the doctrine has been applied by the Ninth Circuit to protect state action against a federal preemption challenge under Section 14501(c)(1) of the FAAA Act. *See, e.g., Tocher*, 219 F.3d at 1048.

Mfrs., 498 F.3d at 1041. "In these circumstances, the market participant doctrine protects comprehensive state policies with wide application from preemption, so long as the type of state action is essentially proprietary." *Id.* (internal quotations omitted). Second, "state action is proprietary if 'the narrow scope of the challenged action defeat[s] an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem.'" *Id.* This test "protects narrow spending decisions that do not necessarily reflect a state's interest in the efficient procurement of goods or services, but that also lack the effect of broader social regulation." *Id.* Each of the two tests "constitutes a separate method of determining whether the state action at issue actually constitutes regulation." *Chamber of Commerce v. Lockyer*, 463 F.3d 1076, 1084 (9th Cir. 2006). Because the Court finds that POLA's action in implementing the Concession Agreement qualifies as proprietary under the first test, the Court finds it unnecessary to consider the second test.

i. What Constitutes Proprietary State Action

POLA argues that its action in requiring motor carriers to enter into the Concession Agreement was proprietary. However, ATA contends that it does not fall within the ambit of the market participant exception because POLA does not itself purchase drayage services or otherwise directly participate in the drayage services market. As a preliminary matter, and contrary to ATA's arguments, the Court finds that the Port need not be a purchaser of drayage services to establish that its action in

entering into the Concession Agreement is proprietary in nature. Indeed, while the first prong of the Ninth Circuit's market participant test is articulated in terms of "procurement," case law demonstrates that the market exception applies in cases where the government is acting as a proprietor would even though it is not buying anything.

In *Alexandria Scrap*, which involved a challenge to Maryland's scrappage incentive program for old, abandoned vehicles, commonly referred to as "hulks," the state was not itself a purchaser or a seller. 426 U.S. at 796. Maryland's program included documentation requirements to obtain monetary incentives for scraping hulks that discriminated against out-of-state vehicle scrap processors. *Id.* at 800-01. The Supreme Court upheld the documentation requirements under the market participant exception, even though Maryland itself was neither the purchaser nor seller of hulks. *Id.* at 808-10. In *Tocher v. City of Santa Ana*, the Ninth Circuit upheld a challenge under the FAAA Act to the city's tow truck company list that governed which towing companies the city's police force would call upon to impound vehicles. 219 F.3d at 1049. The Ninth Circuit held that the list fell within the market participant exception even though vehicle owners, not the city, paid for the towing services. *Id.* at 1043, 1049. In *EMA v. SCAQMD*, the Ninth Circuit applied the market participant exception to protect local air district regulations that were promulgated pursuant to state authority that required fleet operators with substantial operations in the Los Angeles region to purchase vehicles that used alternative fuels. 498 F.2d at 1035, 1045. The

requirements applied not only to state and local air district purchases of vehicles, but to purchases made by every state, county, city, or governmental department or agency, and special districts such as water, air sanitation, transit, and school districts. *Id.* at 1036-37. *EMA v. SCAQMD* thus dealt with regulation that dictated the purchases made by other governmental entities. Further, in *Four T's, Inc. v. Little Rock Mun. Airport Com'n*, 108 F.3d 909, 913 (8th Cir. 1997), and *Transport Limousine of Long Island, Inc. v. Port Auth. of N.Y.* and N.J., 571 F. Supp. 576, 581 (E.D.N.Y. 1983), the market participant exception was applied to protect fees charged by local airports on ground transportation service operators. Neither case involved the purchase by the government agency of transportation services, but the fees were upheld because the agency provided facilities to the ground transportation companies. *Id.*; *see also Crescent City Towing and Salvage Co., Inc. v. Ormet Corp.*, 720 So. 2d 628 (La. 1998) (holding that a publicly owned port that leased a terminal to a private company acted as a market participant when it required the use of specified tugboats in towing ships to the terminal in question, even when it did not itself purchase tugboat services, because it was "seek[ing] to facilitate and improve the overall efficiency and profitability of terminal operations," and thus the market participant doctrine applied to a challenge by a group of tugboat operators who had not been able to secure such contracts).

Accordingly, where restrictions are placed on services essential to the functioning of a government-run commercial enterprise, the market participant

exception applies to non-procurement decisions. These cases hold that the first prong of the Ninth Circuit's market participant test does not turn on whether the state or local government is a purchaser or seller of the goods and services at issue. While traditional procurement may very well be the most obvious instance of proprietary action, it is not the only instance.[10] Indeed, a landlord or facilities operator, such as the Port, that does not procure anything, can still take a proprietary action if it is action in pursuit of profit maximization-as a private company would act rather than as a regulator-by limiting access to its land and facilities.

Second, the Court rejects ATA's contention that the Port itself must participate directly in the drayage market.[11] Rather, the Port's participation in the port

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[10] The Court notes that the Ninth Circuit in *EMA v. SCAQMD* cautioned against a mechanical application of the market participant exception:

> Due regard for congressional intent requires that we not mechanically apply our market participant analysis in *Lockyer* to preemption analysis of federal statutes other than the NRLA. Depending on Congress's intent, another statute might require us to employ a definition of protected state "proprietary action" different from the two definitions adopted on *Lockyer* ... Nevertheless, in the case before us, we need not consider other possible definitions of "proprietary action," for the Fleet Rule provisions ... fall squarely within Lockyer's first category of state proprietary action. That is these provisions "essentially reflect the state entity's own interest in its efficient procurement of needed goods and services ...."

498 F.3d at 1045.

[11] ATA contends that Justice White's opinion for the plurality in *South Central Timber Dev. Co. v. Wunnicke*, supports its

services market is sufficient for its actions in managing its drayage partners to be proprietary, inasmuch as such actions advance its economic interests as a provider of port services. *See Crescent City Towing*, 720 So.2d at 628 (holding that a port acted as a market participant in seeking to "improve the overall efficiency and profitability of terminal operations" when it required the use of specified tugboats in towing ships to the terminal, even

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argument that because POLA does not directly participate in the drayage market, the market participant exception cannot apply here, in that the plurality opinion would hold that the market should be "relatively narrowly defined," and that "[t]he limit of the market participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further." 467 U.S. 82, 89, 104 S. Ct. 2237, 81 L. Ed. 2d 71 (1984). The Court notes that because Justice White's opinion on the market participant doctrine was supported only by a plurality of the Supreme Court justices, it is not binding. Furthermore, the Court reads *Wunnicke* to support its holding here, because the Port is imposing burdens on the narrowly defined market for Port services within which it participates as a landlord and facilities operator. *See id.*

POLA also argues that it is a direct participant in the drayage services market, because, similar to the incentives provided by the state of Maryland in *Alexandria Scrap*, it has provided $44 million of its own funds in monetary incentives to motor carriers for the purchase of clean drayage trucks, has spent $12.5 million to subsidize the purchase of drayage trucks, has itself paid over $1 million to develop and procure electric trucks for Port drayage, and has worked to ensure an adequate supply of cleaner trucks as a discounted price from truck manufacturers. *See* 426 U.S. at 796. Because the Court finds the market participant exception applies under the first prong to its actions as a provider of port services, as noted above, it need not decide whether POLA is a purchaser or participant in the drayage services market.

though it did not directly participate in the market for tugboat services); *Four T's*, 108 F.3d at 913 (holding that an airport acted as a market participant when it charged concession fees on car rental companies even though the airport did not directly participate in the car rental service market); *Transport Limousine*, 571 F. Supp. at 581.

ii. The Port's Action Was "Essentially Proprietary"

The Port's adoption of the Concession Agreement as a whole is an "essentially proprietary" action under the market participant doctrine, because the Port took the action in order to sustain and promote Port operations. The Concession Agreement helps the Port manage its property and facilities as any private landlord and facilities operator would. *See EMA*, 498 F.3d at 1041 (holding that government entities, like a private person, may manage their property in the marketplace). Indeed, through the Concession Agreement, POLA aims to secure the provision of responsible motor carrier services that are necessary for the maintenance and growth of its commercial operations. The Port, a self-sustaining landlord and operator of a commercial enterprise that competes with other West Coast and North American ports, earns its revenues by charging fees for services and infrastructure provided to its tenants (or customers)-shipping lines and stevedoring companies. Apr. 27 Tr. at 175:1-15 (Towsley). As cargo volumes rise, Port revenues increase, and thus to remain competitive the Port has a strong interest in upgrading and expanding its

facilities to increase cargo volumes. Ex. 184 at LAD000341; Apr. 27 Tr. at 175:16-177:4 (Towsley).

However, the evidence demonstrates that Port-generated air pollution interfered with Port growth and has jeopardized the Port's continued viability as a commercial enterprise. The evidence shows that increased diesel particulate matter emissions from drayage trucks, combined with other operations at the Ports, created elevated health risks for those that live in local communities surrounding the Port, including a cancer risk that is sixty percent higher than the average cancer risk outside that area. *See* Ex. 184 at LAD00341; Apr. 23 Tr. at 15:16-21. In response, beginning as early as 2001, the NRDC and a coalition of community groups successfully organized to stop all Port expansion projects for failing to mitigate significant air pollution generated by the projects. The costly litigation and administrative appeals brought by these groups combined with increasing public concern over the air pollution generated by the Port effectively stalled all major Port expansion projects for seven years during a decade of exponential cargo growth at ports nationwide. Apr. 28 Tr. at 130:3-10 (Knatz); Apr. 27 Tr. at 177:19-179 (Towsley). In response, in order to be able to grow, the Port enacted the Clean Air Action Plan, which spawned the Clean Truck Program and the Concession Agreement, to mitigate Port-generated air pollution from Port-serving vehicles and equipment.[12] *See* Ex. 184 at

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[12] The evidence shows that the existing drayage system did "not meet the critical needs of the Port as a proprietor" with respect to homeland security, safety, and a reliable workforce. Ex. 128 at LAD008175-78 (quoting *Boston Harbor*, 507 U.S. at 231-32).

LAD000341. For example, according to David Freeman, the former President of POLA's Board of Harbor Commissioners,

> we quickly realized that in order to grow the Port, we had to abate the pollution because the people in San Pedro and Wilmington were not only angry and not only suffering from terrible air pollution, but they had learned that the law was there to protect them, and the NRDC and others had filed lawsuits, and they had stopped the Port from growing. So green growth which is what we called it was an absolute business necessity .... [W]e responded with what we call our Clean Air Action P[lan], and it was a business necessity. I mean, we could not grow the business without attacking the pollution problem ....

Apr. 27 Tr. at 46:6-48:3 (Freeman); *see also* Apr. 27 Tr. at 177:19-179 (Towsley).

Accordingly, the Court finds that in response to litigation and the threat to POLA's continued economic viability by community groups, as part of the Clean Air Action Plan the Port adopted the Clean Truck Program, which included the Concession Agreement as a "business necessity," in order to eliminate evident obstacles to its growth. *See* Apr. 28 Tr. at 117:18-121:24 (Knatz); Apr. 27 Tr. at 46:6-20 (Freeman). Thus, the Concession Agreement provisions, which were designed as part of the Clean Truck Program in response to litigation and well-organized pressure from the local community, are also proprietary. While the Port had not previously required drayage services providers to contract with it to access Port property, it made an economically

driven decision to do so via the Concession Agreement in its capacity as a landlord and facilities operator.[13] *See Bldg. & Constr. Trades Council v. Assoc. Bldrs. & Cont.*, ("Boston Harbor"), 507 U.S. 218, 231-32 (1993) ("In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction.") (upholding a state requirement that all contractors on a public construction project adhere to a pre-hire labor agreement). Ex. 185 at LAD001212. Accordingly, the market participant exception to preemption applies to the Concession Agreement as a whole.

While the Court finds that the Port's requirement that motor carriers enter into the Concession Agreement is proprietary, the Court also finds that POLA included each provision at issue in the Concession Agreement based on detailed analysis and arms' length negotiation to assuage specific concerns of the litigants and the community, and thus each serves as a requirement for Port

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[13] Consequently, the Court concludes that the facts now more fully developed suggest that the Port presents different government interests than in *Aeroground, Inc. v. City & County of San Francisco*, 170 F. Supp. 2d 950 (N.D. Cal. 2001), and *Florida Transp. Serv. Inc. v. Miami-Dade County*, 543 F. Supp. 2d 1315 (S.D. Fla. 2008), upon which this Court relied in its initial preliminary injunction ruling. Unlike the government entities in those cases, the Port has made a very significant financial investment in the services at issue. Furthermore, *Alexandria Scrap* makes clear that the Port can attach conditions on incentives or subsidies it provides. *See* 426 U.S. at 808-10.

expansion.[14] As a result, each individual provision can be deemed proprietary. The Court nevertheless briefly considers each provision on its individual merits as well.

iii. Concession Agreement Provisions at Issue

The Ninth Circuit concluded that "requiring concession motor carriers to use only their own employees for truck drayage at the Port will contribute to the administrative efficiency and reduce the cost of the Clean Truck Program." *Am. Trucking I*, 559 F.3d at 1056. Regarding the provision, the Ninth Circuit further found that Port adopted the provision because

> the employee model "is the easiest model to administer" because of the "administrative cost of maintaining up-to-date records" for tens of thousands of independent contractors.... Furthermore, the Port felt that its insistence on that particular employment structure would ensure that the Ports' "investments" in retrofitted trucks "will be better protected" because

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[14] The recent lawsuit against the Port of Long Beach in the related *case Natural Resources Defense Council, Inc. v. City of Long Beach*, No. CV10-826 CAS (PJWx), demonstrates that POLA required that motor carriers enter into the Concession Agreement in order to placate specific concerns of the groups that had previously initiated litigation against the Port and thereby stalled its growth. This lawsuit was filed by environmental and community groups based on the Port of Long Beach's settlement with ATA, which effectively eliminated several requirements from its port access agreements with motor carriers that are similar to those at issue in the instant case.

> "Concession motor carriers use only their own employee[s] to drive Port-funded trucks." The Los Angeles Board also sought to alter the allocation of costs. It said that for independent contractors, the costs are externalized, but if they were employees, the costs would be borne by their motor carrier employers.

Id.

As recognized by the Ninth Circuit, the employee driver provision was designed to transfer the financial burden of administration and record-keeping onto the trucking companies instead of the Port. This is clearly an economically motivated action, and one that a private company with substantial market power-such as the oligopoly power of the Port-would take when possible in pursuit of maximizing profit. The provision was also designed to help protect the Port's investment in retrofitted trucks.[15]

While ATA contends that other less sweeping alternatives exist to address the Port's safety and environmental concerns, the existence of alternatives to the employee driver provision is irrelevant to whether the provision addresses a valid proprietary interest.[16] The market participant doctrine does not

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[15] Similarly, the Court finds that the Port's concern regarding ensuring that the Port was provided with a reliable workforce of drayage truck drivers was market-driven.

[16] For example, ATA argues that the Port did not need the employee driver provision because existing federal regulations hold motor carriers equally accountable for employee and independent owner-operator conduct, and further that the

require the government to demonstrate that its solution is the "perfect" remedy for its proprietary problem. *White*, 460 U.S. at 210 (claim that the city requirement "sweeps too broadly, creating more burden than is necessary to accomplish [the city's] stated objectives" was "no help" in deciding whether the market participant exception should apply). Furthermore, the evidence established at trial that under the existing regulatory scheme, 16,000 dirty and unsafe trucks served the Port before implementation of the Clean Truck Program, and expert testimony confirmed that the economics of an independent owner-operator based drayage system creates perverse incentives for independent owner-operators to skimp on maintenance required to protect the Port's investment in retrofitting trucks. *See* Apr. 27 Tr. at 56:11-25 (Freeman); Apr. 28 Tr. at 73:20-77:2 (Brown). Consequently, the weight of evidence demonstrates that the employee provision was adopted to conserve administrative costs of the Clean Truck Program and protect the Port's investment in clean trucks.[17]

Port's safety and environmental concerns could be addressed through additional enforcement of existing regulations-that is, by greater inspection of port trucks by the Port, and by reporting licensed motor carrier misconduct to federal authorities. Apr. 21 Tr. at 36:22-37:11, 33:11-34:16 (Sandberg); Apr. 20 Tr. at 140:5-141:19 (Whelan).

[17] In addition, ATA argues that the Clean Truck Program has been a success even though several Concession Agreement provisions were enjoined by this Court, and thus that the employee driver provision is unnecessary to fulfill the Port's environmental objectives. However, the enjoined provisions of the Concession Agreement ensure that the early success of the

The Court further finds that both the off-street parking and placard provisions were designed specifically to generate goodwill among local residents and to minimize exposure to litigation from them, and they come at no financial cost to the Port. *See* Ex. 185 at LAD001213; Apr. 28 Tr. at 29:10-30:8 (Hall); Apr. 28 Tr. at 81:4-14 (Brown). Moreover, both the financial capability and maintenance provisions are aimed to ensure that the trucking companies had the resources to sustain the Port's investment in cleaner trucks, and would adhere to the manufacturers' maintenance standards, thereby protecting the Port's investments in cleaner trucks in the long term.[18] *See* Ex. 128 at LAD008177 ("[T]he Port cannot buy people new trucks every five years .... It is well known that pollution controls on trucks deteriorate over time if they are not properly maintained. A new 'clean' truck will become 'dirty'

Clean Truck Program is secured for the long-run. *See, e.g.*, Apr. 27 Tr. at 72:7-11, 101:24-102:10 (Freeman).

[18] While the market may provide some incentive for motor carriers to maintain their trucks in order to preserve their reputations, it is clear that some motor carriers have historically violated safety and maintenance regulations. *See* Apr. 23 Tr. at 95:7-96:3; Ex. 185 at LAD001209 (study concluding that while heavy duty vehicles account for only 21.3% of vehicles in the Long Beach Harbor District, between January 1, 2005 and March 10, 2007, they accounted for 25.7% of accidents and 87.1 % of citations issued for improper maintenance). Moreover, even if the maintenance provision is duplicative of existing federal and state safety requirements, few motor carriers are actually inspected to ensure that they are meeting existing standards due to a lack of resources on the federal and state level, and the Court finds that any such redundancy reinforces these requirements. *See* Apr. 28 Tr. at 20:2-21:21 (Hall).

fairly soon without periodic, expensive maintenance."); Ex. 185 at LAD001209; Apr. 20 Tr. at 132:7-12 (Whelan). These actions would also be pursued by a profit-maximizing private company in the same circumstances, and the Court therefore finds them to be proprietary.

4. Preemption by 49 U.S.C. § 14506(a)

ATA contends that the placard provision is separately preempted by another provision of the FAAA Act, 49 U.S.C. § 14506(a), which precludes state entities from requiring a motor carrier "to display any form of identification on or in a commercial motor vehicle ... other than forms of identification required by the Secretary of Transportation." The Court finds that because the required placard is not a "form of identification," but instead merely lists a phone number, it is explicitly not preempted under the language of section 14506(a). *See* Apr. 23 Tr. at 126:19-127:9 (Holmes).

D. *Castle v. Hayes*

ATA renews its argument that the Concession Agreement is preempted because only the Federal Motor Carrier Safety Administration ("FMCSA") can revoke a licensed motor carrier's right to provide drayage services at POLA under *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954). The Supreme Court in *Castle* considered whether a state may bar interstate motor carriers from using state roads as punishment for repeated violations of state highway regulations. For the reasons set forth in this Court's order dated April 28, 2009, which granted in part and denied in part ATA's "motion on remand for

entry of preliminary injunction of Counts I and II of complaint," the Court finds that the Concession Agreement is not preempted under *Castle*.

E. Dormant Commerce Clause

The Commerce Clause of the United States Constitution empowers Congress to "regulate Commerce with foreign Nations, and among the several States." U.S. Const., art. I, § 8, cl. 3. The Commerce Clause also protects interstate commerce from local trade barriers. *See Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 350 (1977). A Commerce Clause violation can be based on a finding of discriminatory impact or undue burden on interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). ATA argues that the Concession Agreement violates the Commerce Clause because (1) it imposes an undue burden on its members' ability to engage in interstate commerce, or (2) it is a *per se* undue burden on interstate commerce pursuant to 49 U.S.C. § 14504a.[19] The Court addresses each argument in turn.

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[19] Because the Court concludes that the Port adopted its Concession Agreement in the exercise of its proprietary, and not its regulatory capacity, its actions fall within the market participant doctrine and are therefore protected from ATA's Commerce Clause challenge. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 435 n. 7, 100 S. Ct. 2271, 65 L. Ed. 2d 244 (1980); *Big Country Foods, Inc. v. Board of Educ. of Anchorage School Dist.*, 952 F.2d 1173, 1180 (9th Cir. 1992) ("If the State is acting as a market participant, rather than a market regulator, the Dormant Commerce Clause places no limitations on its activities."). Nevertheless, the Court addresses the merits of defendant's Dormant Commerce Clause arguments.

1. Undue Burden Pursuant to the Dormant Commerce Clause

The Dormant Commerce Clause "prohibits economic protectionism-that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988). Courts therefore uphold regulations against "undue burden" Commerce Clause attacks "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority*, 550 U.S. 330, 339 (2007) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)) (internal quotations omitted); *see also Conservation Force, Inc. v. Manning*, 301 F.3d 985, 995 (9th Cir. 2002). However, the Dormant Commerce Clause does not protect individual economic actors from "prohibitive or burdensome regulations." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981) ("We stress[ ] that the Commerce Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.").

ATA has failed to show that the Concession Agreement imposes any burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *See United Haulers Ass'n, Inc.*, 550 U.S. at 346. ATA contends that the employee driver provision burdens interstate commerce because it compels motor carriers to abandon their preferred business model in order to continue providing customers with drayage service to

and from the Port, and this would affect the nationwide operation of motor carriers. *See* Patterson III-59:7-61:3. Furthermore, ATA emphasizes the increased costs of Port drayage in shifting from an independent owner-operator model to that of employee drivers and those involved in paying an estimated $20,000 per truck to secure off-street parking, which could affect interstate commerce in the form of higher prices to customers shipping goods interstate.[20] Ex. 183, "Husing Report," at 70-73. The Court agrees with ATA that it appears likely that economic burdens will be imposed on motor carriers by the employee driver and off-street parking provisions of the Concession Agreement. Indeed, the Husing Report concluded that the cost to motor carriers of using employee drivers would "be 167% higher than the cost of using today's [independent owner-operators]"; the BCG Report stated that its Clean Truck Program Option III, which included the requirement for employee drivers, would add $500 million in annual operating costs to the cost of Port drayage, compared to an option without such a requirement; and the Husing Report estimated that the cost of complying with the off-street parking requirement would average $21,237 per truck. Ex. 183, "Husing Report," at 70-73; Ex. 191, "BCG Report," at 80. However, ATA has not demonstrated that such economic burdens on motor carriers translate into impermissible or undue burdens on interstate commerce. Indeed, because drayage trucks transport less than 5% of the cargo

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[20] ATA has put forth no evidence that the placard, maintenance, and financial capability provisions burden interstate commerce. Accordingly, the Court declines to make such a finding.

that they pick up at POLA to points outside of California, the Court finds that any increase in drayage prices that is passed on to customers would predominantly affect commerce within California, rather than encumbering interstate commerce.

Even assuming, *arguendo*, that ATA could show that the Concession Agreement imposes a significant burden on interstate commerce, ATA has failed to show that this burden exceeds the putative local benefits. *See United Haulers Ass'n, Inc.*, 550 U.S. at 346. To the contrary, the evidence shows that the local environmental, economic, safety, and security benefits of the Concession Agreement provisions at issue outweigh any burdens on interstate commerce. *See* Apr. 23 Tr. at 18:12-20:8; 21:22-22:22, "Testimony of Dr. Elaine Chang," (discussing the South Coast Air Quality Management District ("SCAQMD") study that evaluated the emissions reductions that were expected to occur from the Clean Truck Program, including an estimation of 840 fewer premature deaths that could be avoided and a savings of $5.9 billion in health benefits); Ex. 239 at LAD001185, "October 2007 Executive Director's Report to the BHC"; Ex. 232; Ex. 191, "BCG Report," at 77 (concluding that the benefits to the local environment, port operations, vehicle and driver safety, and port security of the Port's adopted plan greatly exceeded the costs). Indeed, in addition to the Concession Agreement's estimated $4.7 to $5.9 billion in economic benefits to the local community resulting from a reduction in premature deaths, loss of work, and medical problems, it is estimated that the Port would support up to 600,000 new jobs that would be lost if the Port is not able to expand. *See*

Ex. 183, "Husing Report," at vi. Some improvements to the air quality of the Port region have already been realized through the Concession Agreement requirements that have not been precluded from enforcement by the preliminary injunction currently in place.[21] The Court further finds that the local benefits of each Concession Agreement provision at issue continue to outweigh any burdens on interstate commerce, including local benefits such as reducing heavy traffic, pollution, and safety hazzards in local communities by requiring off-street parking; empowering local residents to report to Port authorities the unsafe driving, illegal parking, and environmental violations of trucks; ensuring that drayage trucks are well-maintained and thus operating safely by requiring regular maintenance; and confirming that concessionaires can financially afford to meet the Port's safety, security, and environmental standards.

2. Unreasonable Burden under 49 U.S.C. § 14504a(c)

ATA further contends that the Concession Agreement provisions at issue constitute an unreasonable burden *per se* under 49 U.S.C. § 14504a(c), which provides that:

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[21] ATA argues that the benefits of the Clean Truck Program can be achieved by less burdensome means, such as those imposed by the Port of Long Beach. However, the existence of less burdensome alternatives is irrelevant to the "undue burden" inquiry at hand, which is whether the Concession Agreement provisions at issue place a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *See United Haulers Ass'n, Inc.*, 550 U.S. at 346.

> For purposes of this section, it shall be considered an unreasonable burden upon interstate commerce for any State or any political subdivision of a State, or any political authority of two or more States ... to enact, impose, or enforce any requirement or standards with respect to ... any motor carrier ... in connection with ... the annual renewal of the intrastate authority, or the insurance filings, of the motor carrier or private motor carrier, or other intrastate filing requirement necessary to operate within the state ...."

ATA argues that the requirement to execute a Concession Agreement with the Port is a necessary precondition to the right of federally licensed motor carriers to dray cargo at POLA, which is within the state of California, and thus that the Concession Agreement is preempted by 49 U.S.C. § 14504a.

The Court finds that ATA has not demonstrated that section 14504a preempts POLA's Concession Agreement. Indeed, Congress disclaimed any intent to broadly preempt state action related to motor carriers, providing that, "[e]xcept as provided in [49 U.S.C. §§ 14504, 14504a, and 14506], this subtitle is not intended to prohibit any State or any political subdivision of any State from enacting, imposing, or enforcing any law or regulation with respect to a motor carrier ... that is not otherwise prohibited by law." Unified Carrier Registration Act of 2005, Pub. L. No. 109-59, § 4302, 119 Stat. 1761, 1761. Congress adopted section 14504a as part of the Unified Carrier Registration Act of 2005, which replaced one central repository for information relating to motor carriers,

the Single State Registration ("SSR"), with another, called the Uniform Carrier Registration System ("UCRS"). *See* 49 U.S.C. § 13908. The UCRS centralizes information regarding motor carriers, with the intent that such carriers can, by registering their operations in one state, operate in every other state that participates in the UCRS. In section 14504a, Congress directed the Secretary of Transportation to develop uniform yearly filing and fee requirements for the UCRS. 49 U.S.C. § 14504a(d)(2), (7). Thus, section 14504a preempts a state's authority to impose additional fees or regulations-related to registering a motor carrier's operations so that it can operate within the state-beyond those developed by the Secretary. *See Mid-Con Freight Sys., Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 440, 447-51 (2005) (explaining the rationale for and the limits of preemption under the SSR). Indeed, the portion of section 14504a upon which ATA relies addresses only the ability of states to enforce requirements related to motor carriers' authorization to "operate within the State" in question. *See* 49 U.S.C. § 14504a(c)(1)(D).

POLA's Concession Agreement does not fall within the scope of section 14504a, because it does not impose additional regulations related to registering a motor carrier's operations so that it can operate "within the state" beyond those developed by the Secretary of Transportation. First, drayage truckers do not have to sign the Port's Concession Agreement to operate in California; instead they can operate anywhere in California, including at other ports within the state, without signing POLA's Concession Agreement. Instead, the agreement merely addresses

the ability of drayage trucks to enter the Port's own private property for business purposes, not to drive generally on public highways. Second, POLA does not transmit the information it collects to UCRS, and thus does not interfere with motor carriers' federal authorization to operate within the state. Finally, California has expressed no intention to withhold intrastate operating authority absent compliance with POLA's Concession Agreement. Because the Concession Agreement has no effect on state registration requirements related to the UCRS, section 14504a is not relevant to this action. Accordingly, the Court concludes that the Concession Agreement does not constitute a burden on commerce under section 14504a.

IV. CONCLUSION

Based on the foregoing, and after careful consideration of the record in this case, the Court concludes as follows:

- The employee driver provision and the off-street parking provision of POLA's Concession Agreement are "related to [motor carriers'] price, route, or service," and thus fall under the FAAA Act, but the maintenance provision, the placard provision, and the financial capability provision are not.

- The Tidelands exception does not apply to exempt the Concession Agreement from preemption by the FAAA Act.

- The maintenance provision and the placard provision of the Concession Agreement fall under

the safety exception to the FAAA Act, but the employee driver provision, the off-street parking provision, and the financial capability provision do not.

- The Concession Agreement provisions fall within the ambit of the market participant exception to the FAAA Act.

- The placard provision is not separately preempted by 49 U.S.C. § 14506(a).

- The Concession Agreement is not preempted pursuant to *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954).

- The provisions of the Concession Agreement at issue do not constitute an undue burden on interstate commerce pursuant to the dormant Commerce Clause.

- The provisions of the Concession Agreement at issue do not constitute an unreasonable burden on interstate commerce under 49 U.S.C. § 14504a(c).

Based on the foregoing, the Court awards judgment in favor of defendants City of Los Angeles, Harbor Department of the City of Los Angeles, and Board of Harbor Commissioners of the City of Los Angeles. Defendants are directed to prepare a form of final judgment in accordance with the Rules of this Court.

IT IS SO ORDERED.

APPENDIX C

United States Court of Appeals,
Ninth Circuit.*

AMERICAN TRUCKING ASSOCIATIONS, INC.,*
Plaintiff-Appellant,

v.

The CITY OF LOS ANGELES, The Harbor Department of the City of Los Angeles, The Board of Harbor Commissioners of the City of Los Angeles, The City of Long Beach, The Harbor Department of the City of Long Beach, and The Board of Harbor Commissioners of the City of Long Beach,
Defendants-Appellees.
Coalition for Clean Air, Inc.; Natural Resources Defense Council; Sierra Club,
Defendant-intervenors-Appellees.

No. 09-55749.
Argued and Submitted Nov. 4, 2009.
Filed Feb. 24, 2010.

Attorneys and Law Firms

Robert Digges, Arlington, VA, Christopher C. McNatt Jr., Pasadena, CA, W. Stephen Cannon, Seth D. Greenstein, and Stephen S. Anderson Jr., Washington, DC, for plaintiff-appellant.

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* The plaintiff American Trucking Associations, Inc., and the City of Long Beach defendants have settled their controversies pending this appeal and are no longer parties. We consider this appeal only in relation to the City of Los Angeles defendants' and plaintiff's claims relating to the Port.

Steven S. Rosenthal, Alan K. Palmer, David L. Cousineau, Susanna Y. Chu, Washington, DC, Carmen A. Trutanich, Thomas A. Russell, Joy M. Crose, Simon M. Kann, San Pedro, CA, for City of Los Angeles defendants-appellees.

Appeal from the United States District Court for the Central District of California, Christina A. Snyder, District Judge, Presiding. D.C. No. 2:08-cv-04920-CAS-CT.

Before: MYRON H. BRIGHT,** Senior Circuit Judge, HARRY PREGERSON and RONALD M. GOULD, Circuit Judges.

Opinion

BRIGHT, Circuit Judge:

In this extensive litigation, American Trucking Associations, Inc. ("ATA") seeks preliminary injunctive relief against certain regulations imposed by the Port of Los Angeles, a local governing body, upon motor carriers entering the Port premises. ATA contends these regulations are preempted by federal law. The district court denied injunctive relief in part, determining that the Port regulations in question are authorized under the motor vehicle safety exception in the federal law. ATA appeals, and we affirm with one exception.

** The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

I. BACKGROUND

This litigation has been ongoing since July 28, 2008, when ATA filed its complaint against all defendants. ATA contends that certain mandatory concession agreements between the Port of Los Angeles ("POLA")[1] and motor carriers impose requirements on the truckers, and the execution of those agreements is required for any trucker to enter the Port premises. ATA asserts that provisions of the concession agreements are preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAA Act"),[2] and that the concession agreements unduly burden motor carriers' ability to engage in interstate commerce. The defendants, POLA, claim that these provisions qualify under the motor vehicle safety exception to the FAAA Act.[3]

To put the present stage of this litigation and this appeal in context, we refer to prior proceedings in the district court and in this court.

On June 30, 2008, ATA moved for a preliminary injunction restraining implementation of the Port's mandatory concession agreements under the FAAA Act and the Supremacy Clause of the Constitution. The district court denied relief. The court determined that while the concession agreements "related to a price, route, or service" of motor carriers which

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[1] We shall refer to the City of Los Angeles defendants as the Port of Los Angeles ("POLA") encompassing the City of Los Angeles and its agency responsible for the operation of the Port.

[2] 49 U.S.C. § 14501(c).

[3] 49 U.S.C. § 14501(c)(2)(A).

would generally render them preempted under the FAAA Act, ATA was unlikely to succeed on the merits because the concession agreements likely fell under the FAAA Act's motor vehicle safety exception and therefore ATA had not established a proper basis for preliminary injunctive relief. *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 577 F. Supp. 2d 1110 (C.D. Cal. 2008) ("*Am. Trucking I*").

ATA appealed to this court. We reversed and remanded, explaining that many provisions of the concession agreements were likely preempted by the FAAA Act. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009) ("*Am. Trucking II*").

On remand, the district court, following this court's order in *Am. Trucking II*, determined some of the concession agreement provisions were likely preempted[4] while others were not. *Am. Trucking III*, 2009 WL 1160212. ATA again appeals, arguing the district court (1) erred in concluding several provisions were not preempted by the FAAA Act; (2) erred in concluding that POLA has authority to preclude motor carriers from entering the Port for failing to comply with the concession agreements;

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[4] On remand, the district court concluded that the following provisions did not fall within the motor vehicle safety exception: independent operator phase-out, hiring preferences, financial disclosure requirement, health insurance requirement, compliance with truck routes and parking restrictions, mandatory concession fees, and Clean Truck Tariff program. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, No. CV 08-4920 CAS (CTx), 2009 WL 1160212, at *7-11, 14, 17 (C.D. Cal. Apr. 28, 2009) (*Am. Trucking III*).

and (3) abused its discretion by not enjoining enforcement of the concession agreements in their entirety. As we have noted, we affirm except as to one provision of the concession agreements.

II.

The law at issue in this appeal is the FAAA Act. We discussed the FAAA Act in great length in our prior opinion. *See Am. Trucking II*, 559 F.3d at 1053-55. The FAAA Act preempts states from enacting or enforcing "a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1). The FAAA Act includes an exception from preemption for motor vehicle safety, stating that this Act:

> shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

49 U.S.C. § 14501(c)(2)(A). "We review the district court's decision regarding preemption and its interpretation and construction of a federal statute de novo." *Am. Trucking II*, 559 F.3d at 1052 (citing *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1186 (9th Cir. 1998)).

ATA and POLA agree that the concession agreements are regulations which "relate[ ] to a price, route, or service." *See* 49 U.S.C. § 14501(c)(1). However, the parties disagree as to whether the motor vehicle safety exception applies to the provisions of the concession agreements that the district court determined were not preempted by the FAAA Act.

A.

ATA disputes that the following provisions of the concession agreements fall within the FAAA Act's motor vehicle safety exception: (1) requiring that concessionaires be licensed motor carriers in good standing; (2) requiring that concessionaires use only "permitted trucks;" (3) mandating that motor carriers are solely responsible for their drivers and employees; (4) requiring that motor carriers prepare a truck maintenance plan and holding motor carriers responsible for vehicle condition and safety; (5) mandating that motor carriers keep records of driver enrollment in the Transportation Worker Identification Credential ("TWIC") program; (6) requiring that motor carriers ensure that each truck entering and leaving Port property is equipped with a means of Clean Trucks Program Compliance Verification; (7) ensuring that motor carriers comply with federal, state, municipal, and port security laws; and (8) requiring that motor carriers update and maintain accurate data in the drayage truck registry, concession registry, and driver registry and allowing POLA to inspect motor carriers' property and records regarding compliance with the concession agreements.

After reviewing these eight provisions de novo, we agree with the district court's well-reasoned opinion that specifically analyzes each of the provisions and considers whether the Port was acting out of safety concerns when it enacted each requirement. We reject ATA's contentions that the provisions are not safety-related simply because they duplicate already-existing federal laws. Duplication of existing policies does not negate POLA's intent in adopting these requirements. Evidence in the record from POLA officials establishes that POLA adopted these provisions out of concern for safety at the Port. Although we do not merely take POLA at its word, *see ATA II*, 559 F.3d at 1054, upon close scrutiny of the provisions, we conclude that the provisions are genuinely responsive to motor vehicle safety and are not preempted by the FAAA Act.

B.

ATA also argues that the district court erred in concluding that an additional requirement, that drayage trucks display identifying placards with a telephone number, fell within the motor vehicle safety exception. ATA asserts that 49 U.S.C. § 14506(a) precludes states and local agencies from requiring motor carriers to display identification other than that required by the Secretary of Transportation.

We agree with ATA that § 14506(a) does not contain a safety exception. We vacate the district court's order regarding this provision and remand for further consideration in connection with any further proceeding seeking permanent injunctive relief.

III.

ATA argues that the district court erred in concluding that POLA has authority to preclude motor carriers from entering the Port for failing to comply with the concession agreements' safety requirements. Relying on *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954), ATA asserts that POLA cannot suspend a motor carrier's interstate rights as a means of enforcing safety regulations via the concession agreements.

The Supreme Court in *Castle* considered whether a state may bar interstate motor carriers from using state roads as punishment for repeated violations of state highway regulations. *Castle*, 348 U.S. at 62. The Court explained that the Federal Motor Carrier Act "adopted a comprehensive plan" that "was so all-embracing that former power of states over interstate motor carriers was greatly reduced. No power at all was left in states to determine what carriers could or could not operate in interstate commerce." *Id.* at 63. Instead, the federal government had the exclusive power to make this decision by issuing certificates of convenience and necessity. *Id.* The Court stated that Congress narrowly limited the power to revoke or suspend an outstanding certificate by giving the Interstate Commerce Commission ("ICC") the sole power to revoke a motor carrier's certificate for willfully refusing to comply with the laws. *Id.* at 63-64. The ICC could only suspend or revoke a certificate "after a hearing and a finding that a carrier has willfully failed to comply with the provisions of the Motor Carrier Act." *Id.* at 63. The Court reasoned that

"[u]nder these circumstances, it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate." *Id.* at 64.

The district court concluded that *Castle* did not control because it was decided forty years before the FAAA Act was adopted, the FAAA Act includes a motor vehicle safety exception to preemption, and *Castle* concerned a significantly different factual scenario than the present case. *Am. Trucking III*, 2009 WL 1160212, at *3. The district court explained that *Castle* specifically considered a state's right to punish a motor carrier for repeated violations of safety standards under the Federal Motor Carrier Act, the predecessor to the FAAA Act. *Id.*

We agree with the district court that *Castle* concerned an entirely different Act, the Federal Motor Carrier Act, and its relevance is limited to the facts at issue in that case. The Federal Motor Carrier Act granted only the ICC, the agency charged with issuing certificates of convenience, the power to revoke motor carriers' certificates of convenience. The ICC no longer regulates motor carriers.[5] For purposes of a preliminary injunction, we conclude that *Castle* does not establish the likelihood of ATA succeeding on the merits on this issue. However, this issue is not finally resolved and may be reconsidered in further proceedings for a permanent injunction.

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[5] *See* Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, § 101, 109 Stat. 803, 804 (1995) (terminating the ICC).

IV.

In *Am. Trucking II*, we acknowledged that the concession agreements contain severability provisions which state that if any part of the agreement is found unenforceable, "such determination shall only apply to the specific provision and the remainder of this Concession shall continue in full force and effect." We previously remanded the case for the district court to consider whether preempted provisions of the concession agreements could be severed from the remainder of the agreements or whether the court should enjoin the enforcement of the concession agreements in their entirety. *Am. Trucking II*, 559 F.3d at 1060. On remand, the district court concluded that enjoining the preempted provisions of the concession agreements would not prevent the remaining provisions from functioning effectively and that the concession agreements were severable because the provisions were distinctly separated by topic. *Am. Trucking III*, 2009 WL 1160212, at *20.

On appeal, ATA argues the district court erred in not enjoining enforcement of the concession agreements entirely. We disagree. The provisions in the concession agreements that are not preempted by the FAAA Act are distinctly separated by topic from the provisions which are preempted. Omitting the preempted provisions from the concession agreements does not require the district court to "examine and rewrite most of the statute." *See United States v. Manning*, 527 F.3d 828, 840 (9th Cir. 2008) (declining to "unscrambl[e] the egg" where excising preempted provisions from the state's act

would require the district court to rewrite most of the statute). We affirm the district court's decision to sever the preempted provisions of the concession agreements.

V.

Accordingly, we **AFFIRM** the district court's order denying injunctive relief in part to ATA with one exception noted in the text.[6]

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[6] We deny ATA's pending motion to assign this case to the same panel which decided *Am. Trucking II*.

APPENDIX D

United States District Court,
C.D. California,
Western Division.

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Plaintiff,

v.

The CITY OF LOS ANGELES, et al., Defendants.

No. CV 08-4920 CAS (CTx).
April 28, 2009.

Attorneys and Law Firms

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Alan K. Palmer, David L. Cousineau, Douglas A. Tucker, Steven S. Rosenthal, Susanna Y. Chu, Tiffany Ray Moseley, Kaye Scholer LLP, Jonathan C. Benner, Mark E. Nagle, Troutman Sanders LLP, Washington, DC, Bryant S. Delgadillo, Kaye Scholer, Los Angeles, CA, Simon Michael Kann, Los Angeles City Attorney's Office, San Pedro, CA, Dominic T. Holzhaus, Robert E. Shannon, Long Beach City Attorney, Long Beach, CA, Paul L. Gale, Troutman Sanders LLP, Irvine, CA, for Defendants.

Opinion

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION ON REMAND FOR ENTRY OF PRELIMINARY INJUNCTION OF COUNTS I AND II OF COMPLAINT

CHRISTINA A. SNYDER, District Judge.

I. Introduction and Background

Defendant City of Los Angeles owns and operates the Port of Los Angeles (sometimes referred to herein as "POLA"). Compl. ¶ 12. Defendant City of Long Beach owns and operates the Port of Long Beach (sometimes referred to herein as "POLB"). Compl. ¶ 12. The Port of Los Angeles and the Port of Long Beach ("the Ports") form a single contiguous port area along San Pedro Bay in Los Angeles County. Authority to manage the assets of the port and craft rules governing port-related activities in each city is invested in defendants Board of Harbor Commissioners of the City of Los Angeles and Board of Harbor Commissioners of the City of Long Beach. Compl. ¶ 8.

On December 7, 2007, the California Air Resources Board adopted rules to limit the emissions from diesel trucks providing drayage services at California ports. Compl. ¶ 26. Around this same time, the Ports developed a Clean Air Action Plan ("CAAP"). Included in the CAAP was the Clean Trucks Program, a multi-faceted program designed to reduce the emissions of trucks providing drayage services to the Ports.

On March 20, 2008, defendant Los Angeles Harbor Board adopted an order which provides that "beginning October 1, 2008, at 8:00 am, no Terminal Operator shall permit access into any Terminal in the Port of Los Angeles to any Drayage Truck unless such Drayage Truck is registered under a Concession from the Port of Los Angeles ..." Compl. ¶ 19. On February 19, 2008, defendant Long Beach Harbor Board similarly mandated that drayage trucks would be required to hold a Concession agreement with the City of Long Beach in order to enter the Port of Long Beach beginning on October 1, 2008. Compl. ¶ 22.

On July 28, 2008, plaintiff American Trucking Associations, Inc. ("ATA") filed the complaint in this action against defendants City of Los Angeles, Harbor Department of the City of Los Angeles, and Board of Harbor Commissioners of the City of Los Angeles (collectively "Los Angeles defendants"), and City of Long Beach, Harbor Department of the City of Long Beach, and Board of Harbor Commissioners of the City of Long Beach (collectively, "Long Beach defendants"). The first and second claims asserted in the complaint allege that the Los Angeles and Long Beach Concession agreements are preempted by the Supremacy Clause of the United States Constitution and the Federal Aviation Administration Authorization Act of 1994 ("the FAAA Act"). The third claim alleges that the Concession agreements are preempted because they place an undue burden on and discriminate against the right of plaintiff motor carriers to engage in interstate commerce.

On July 30, 2008, ATA moved for a preliminary injunction pursuant to the first and second claims for

relief restraining implementation of the Ports' mandatory Concession agreements. On September 9, 2008, this Court denied ATA's motion for a preliminary injunction. *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 577 F. Supp. 2d 1110 (C.D. Cal. 2008). The Court found that ATA would likely demonstrate that the Concession agreements "related to a price, route, or service" of motor carriers, which would generally render them preempted under the FAAA Act. *Id.* at 1118; *See* 49 U.S.C. § 14501(c)(1). However, the Court held that ATA was nevertheless unlikely to succeed on the merits, because the Concession agreements likely fell under the FAAA Act's statutory "safety exception." *Id.* at 1125; *See* 49 U.S.C. § 14501(c) (2)(A) (preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles ...").[1] The Court also found that ATA had not shown a likelihood of irreparable harm, and that the balance of the hardships and the public interest weighed in favor of denying the injunction. *Id.* at 1126-1128. On March 20, 2009, in *Am. Trucking Ass'ns Inc. v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009) (hereinafter "*Am. Trucking*") the United

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[1] The safety exception provides in full that the preemption provision

> shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

49 U.S.C. § 14501(c)(2)(A)

States Court of Appeals for the Ninth Circuit reversed the Court's September 9, 2008 order and remanded the case to this Court for further proceedings.

On April 3, 2009, ATA filed a motion on remand for entry of preliminary injunction on counts I and II of the complaint. On April 13, 2009, the Los Angeles defendants and the Long Beach defendants each filed oppositions. Also on April 13, 2009, intervenors the Natural Resources Defense Council, Sierra Club, and Coalition for Clear Air Inc. filed an opposition.[2] ATA filed a reply on April 17, 2009. A hearing was held on April 27, 2009. After carefully considering the arguments set forth by the parties, the Court finds and concludes as follows.

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[2] In their brief, intervenors do not address the provisions of the Concession agreements specifically, but instead argue generally that an injunction enjoining the implementation of the Concession agreements will "stop cold the clean up of port trucks." Intervenors' Opp'n at 1. Specifically, intervenors argue:

> Both the Port of Los Angeles and the Port of Long Beach require that, to obtain an incentive payment or subsidy for clean trucks, a driver or trucking company must be a Port concessionaire. Thus, if the concession plans are put on ice, the flow of ... money to purchase or subsidize new trucks will come to a stop."

Intervenors' Opp'n at 1.

On April 13, 2009, intervenors also filed a request to cross-examine declarants Billy Joe Patterson, Reid Wicker, and Gregory Owen at the April 27, 2009 hearing. ATA filed an opposition on April 20, 2009. On April 24, 2009, the Court denied intervenors' motion to cross-examine declarants, because the Court determined that such cross-examination would be outside of the scope of the Ninth Circuit's mandate.

II. The Ninth Circuit Decision

In *Am. Trucking*, 559 F.3d 1046, the Ninth Circuit began by noting the standard for preliminary injunction under *Winter v. Natural Resources Def. Council, Inc.*, --- U.S. ----, ----, 129 S. Ct. 365, 374, (2008). Specifically, under *Winter*, "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.*

The Ninth Circuit then turned to the likelihood of success on the merits prong, and first affirmed the Court's determination that the Los Angeles and Long Beach Concession agreements likely relate to "price, route or service" of motor carriers under the FAAA Act. *Am. Trucking*, 559 F.3d at 1053 ("that the Concession agreements relate to prices, routes or services of motor carriers can hardly be doubted"). The Ninth Circuit then examined the Concession agreements under the statutory safety exception to the FAAA Act, and found that "the record demonstrates that the Ports' concern was increasing efficiency and regulating the drayage market[,]" rather than motor vehicle safety. *Id.* at 1056. The Ninth Circuit thus found that "[i]t is rather clear that some, indeed many, of the provisions of the Concession agreements are not likely to live in the light cast by that strobe." *Id.* at 1055. As discussed in more detail in Part III.D, *infra*, the Ninth Circuit specifically discussed certain provisions of the Concession agreements that it considered

particularly unlikely to survive preemption under the safety exception. The Ninth Circuit next examined the remaining *Winter* factors, and concluded that ATA had demonstrated a likelihood of irreparable harm, and that "the balance of the equities and the public interest do weigh in favor of a preliminary injunction in this case as to at least portions of the Concession agreements." *Id.* at 1060.

The Ninth Circuit also noted that the Concession agreements contained a severance provision, and stated that it was "not prepared to hold that every provision must be preempted." *Id.* at 1060. The Ninth Circuit therefore remanded to this Court "for further consideration of the specific terms of each agreement and for the issuance of an appropriate preliminary injunction." *Id.* at 1060. However, the Ninth Circuit noted that "if major portions of the agreements are enjoined, it may not be practicable to leave the remaining portions standing." *Id.* at 1060, citing *United States v. Manning*, 527 F.3d 828, 840 (9th Cir. 2008) (statute had a savings clause, but because the "most significant" parts were excised, the whole was preempted); *see also Nat'l Adver. Co. v. City of Orange*, 861 F.2d 246, 250 (9th Cir. 1988) (partial invalidation of ordinance was appropriate based on the intent of the City and the fact that the remainder of the ordinance could still "function effectively").

III. DISCUSSION

The Court begins the analysis by addressing two of the arguments raised by ATA on remand, namely that: (1) *Castle v. Hayes* 348 U.S. 61 (1954) and its progeny, as well as Cal. Veh. Code § 34505.6(a),

preclude the Ports from enforcing the Concession agreements; and (2) the Concession agreements are duplicative of existing law and therefore may not be enforced.

The Court then examines the scope of the safety exception, and turns to an inquiry as to whether specific challenged provisions of the Concession agreement fall within it. The Court first examines those provisions that were specifically addressed by the Ninth Circuit in *Am. Trucking*, 559 F.3d 1046. Subsequently, the Court will turn to provisions that the Ninth Circuit did not specifically address.

A. *Castle v. Hayes* and Cal. Veh. Code § 34505.6(a)

ATA argues that, regardless of whether or not the individual provisions of the Concession agreements would fall within the safety exception, the Concession agreements are nevertheless preempted in their entirety, because "states do not have the ability to determine the operating rights of *motor carriers* engaged in interstate commerce." Mot. at 13. As ATA did in its original motion for preliminary injunction, ATA cites *Castle*, 348 U.S. 61, and similar cases to support this argument. In *Castle*, the Court held that under the Federal Motor Carrier Act, a state could not punish a motor carrier for repeated violations of safety standards by suspending the motor carrier's right to engage in interstate commerce over the state's roads. *Id.* at 63-64.

In its September 9, 2008 order, the Court noted that *Castle* was decided forty years before the passage of the FAAA Act and the safety exception, and involved

a significantly different factual scenario than the one at issue. ATA argues here that the Court should reconsider this finding, given that, in an amicus brief before the Ninth Circuit, the United States cited *Castle*, which demonstrates, according to ATA, the case's "continuing vitality." Mot. at 14, n. 14, citing *amicus curiae* of United States (McNatt Decl. Ex. 2) at 9-10 (arguing that the Supreme Court has recognized that "comprehensive federal regulation precludes state or local entities from 'exercising any veto power over' interstate commerce service providers").

ATA also argues that California Vehicle Code confirms that a state has no authority to suspend a motor carrier's interstate operations for safety violations, and that, therefore, it cannot delegate this authority to the ports under the guise of safety regulations. Mot. at 14, citing Cal. Veh. Code § 34505.6(a) (stating that if the Department of California Highway Patrol finds that a motor carrier has engaged in a "constant failure" to maintain its vehicles "so as to justify a suspension or revocation of the motor carrier's motor carrier permit" then "for interstate operators, the department shall *recommend* to the Federal Motor Carrier Safety Administration that appropriate administrative action be taken against the carrier ...") (emphasis added).

Notwithstanding ATA's arguments, the Court notes that the Ninth Circuit's holding did not disturb the Court's finding that *Castle*, 348 U.S. 61, is not controlling in this action, and similarly declined to address the parties' arguments under the California

Vehicle Code. For these reasons, as well as the reasons set forth in the Court's September 9, 2009 order, the Court finds these arguments to be unpersuasive.

B. Whether Duplication of Other Legal Requirements Renders the Concession Agreements Invalid

It is undisputed by the parties that many of the provisions of the Concession agreements-particularly those provisions dealing with the Drayage Truck Registry ("DTR"), the federal Transportation Worker Identification Credential (TWIC), and other federal and state safety and security standards and requirements-seek to enforce compliance with requirements already imposed by federal and state law.

ATA argues that because many of the Concession agreements' provisions are duplicative of federal and state standards already in effect, the Concession agreements should be enjoined in their entirety. ATA also argues that many of these existing federal and state mechanisms, such as the DTR and the TWIC, allow the Ports to achieve all of their safety needs without the implementation of Concession agreements. *See also Am. Trucking*, 559 F.3d at 1059 ("with or without the Concession agreements, many other programs and laws designed to alleviate those problems are in existence and are not challenged. For example: The Drayage Truck Registry program, the Transportation Worker Identification Credential program, the remainder of the Clean Trucks Program, the Port Check program and the PierPass program would not be affected.")

The Los Angeles defendants, however, note that ATA has presented no authority for the proposition that a safety-related provision falls outside of the FAAA Act's safety exception if there is another mechanism in place for promoting the same safety goals. Los Angeles Br. at 4, citing *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 ("preemption analysis does not insist upon a least restrictive means test"), cited by *Galactic Towing, Inc. v. City of Miami Beach*, 274 F. Supp. 2d 1315 (S.D. Fla. 2002), aff'd 341 F.3d 1249, 1321 (11th Cir. 2003) (finding a towing ordinance to be within the safety exception and thus not preempted).[3]

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[3] The Long Beach defendants also argue that ATA's argument is inconsistent with 49 U.S.C. § 31441, which provides that "[a] State may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this section may not be enforced." This provision requires a state promulgating laws or regulations affecting commercial motor vehicle safety to submit the law to the Secretary of Transportation to review. *See* 49 U.S.C. § 31141(b). If the Secretary determines that the state law or regulation has the same effect as a regulation prescribed by the Secretary, it may be enforced. *See* 49 U.S.C. § 31141(c)(2). A more stringent regulation may also be enforced, unless the Secretary decides that the State law has no safety benefit, is incompatible with the Secretary's regulation, or enforcement would cause an unreasonable burden on interstate commerce. *See* 49 U.S.C. § 31141(c)(4). The purpose of 49 U.S.C. § 31441 *vis-a-vis* the safety exception is that it

> affords the Secretary of Transportation a means to prevent the safety exception from overwhelming the lawmakers' deregulatory purpose. That provision authorizes the Secretary to void any 'State law or regulation on commercial motor vehicle safety' that, in the Secretary's judgment, 'has no safety benefit ... [or] would cause an unreasonable burden on interstate commerce.' ...

The Los Angeles defendants further argue that, without the Concession agreements, the Ports in fact cannot enforce their safety goals. In this regard, the Los Angeles defendants submit the declaration of John M. Holmes, Deputy Executive Director for Port Operations for the Port of Los Angeles. *See* Holmes Decl. ¶ 21. Los Angeles defendants argue that "[i]t is the Concession agreement that gives POLA the enforcement mechanism to restrict [motor carriers] from POLA property that are not, for example, in compliance with truck safety regulations ... It also gives POLA the ability to inspect concessionaire records demonstrating that drivers are TWIC approved and that the applicable safety and security regulations and laws are followed." Holmes Dec. ¶ 22; *see also* Holmes Decl. ¶ 15 ("A direct relationship

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City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 122 S. Ct. 2226, 2236-37, 153 L. Ed. 2d 430 (2002). The Long Beach defendants argue that 49 U.S.C. § 31441 therefore demonstrates that a safety regulation is not invalid *per se* just because it replicates existing federal law, unless the Secretary finds that to be so. Long Beach Opp'n at 9.

The Long Beach defendants further argue that the Court should stay this proceeding so that the Federal Motor Carrier Safety Administration of the Department of Transportation may review the elements of the Concession agreement under 49 U.S.C. § 31141(c)(4). By contrast, it is ATA's position that § 31141 supplements, but does not substitute for, § 14501(c)(1) and therefore review is not a necessary prerequisite to the instant proceedings. Reply at 24, citing United States Br. at 18 ("The Secretary's authority [under 49 U.S.C. § 31141(c) is supplemental to-not a substitute for-the general preemption provision"). The Court agrees with ATA that there is no indication in the statutory scheme that such a review is a prerequisite to this Court's determination of whether the provisions of the Concession agreements are preempted. Therefore, the Court finds that a stay is not warranted.

with [licensed motor carriers], the entities directly coordinating drivers, trucks, and cargo, is essential if POLA is to assure itself of the safe and secure operation of drayage. There is no other way that I am aware of for POLA to obtain a direct relationship with [licensed motor carriers] other than through a Concession agreement. It is the Concession agreement structure that gives POLA the ability to collect reliable information, correlate the various relevant pieces of information, and apply the information in a timely way to address the drayage security issues that POLA faces").

The Court agrees with the Los Angeles defendants that the mere fact that certain provisions of the Concession agreements require compliance with already existing obligations under federal and state law does not lead to the conclusion that the Concession agreements cannot fall within the safety exception. The Holmes declaration provides support for defendants' argument that the Concession agreements are a necessary mechanism by which the Ports can ensure that trucks entering the Ports comply with the various safety-related provisions of federal and state law. For example, defendants note that the Concession agreements provide a mechanism to promote compliance with the federal TWIC program, by allowing the Ports to confirm that each truck driver accessing the Ports has a TWIC, and that no trucker accessing the Ports is using the TWIC of another. Holmes Decl. ¶ 7.g. Similarly, the Ports note that Concession agreements provide a mechanism by which the Ports can ensure that each truck accessing the Ports has its own Radio Frequency Identification Device ("RFID"), and that

the same RFID is not being used in multiple trucks. Holmes Decl. ¶ 7.g. Therefore, provisions of the Concession agreement may be "genuinely responsive to safety," even where they overlap with existing legal requirements, because they provide a unique enforcement mechanism for ensuring compliance with safety-related laws and regulations. Therefore, the Court declines to enjoin the Concession agreements in their entirety on this basis. Instead, the Court turns to the safety exception, in order to determine whether the specific provisions of the Concession agreements fall within the exception.[4]

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[4] At oral argument, ATA also argued that the Concession agreements improperly allow the Ports to make discretionary determinations as to who may operate a truck at the Ports, and that such discretion will allow the Ports to exclude certain trucks, even where those trucks otherwise comply with the non-preempted safety-related requirements of the Concession agreements. In response, the Los Angeles defendants noted that of the 847 motor carriers that have applied for Concession agreements, 847 have been granted, indicating that the Ports are not importing discretionary factors into the decision. The Court finds that at this juncture, ATA's argument is speculative, because there is no indication that the Ports are using the Concession agreements to make discretionary decisions excluding certain motor carriers from the Ports. Therefore, the Court will not enjoin the Concession agreements in their entirety on this basis. Moreover, in light of the relief granted herein, it does not appear that the Ports are left with the unfettered discretion about which ATA complains. The Court is willing to revisit these arguments at a later date upon presentation of evidence that defendants are using the Concession agreements to exclude trucks on preempted, non-safety related grounds.

C. Scope of the Safety Exception

As the Court stated in its September 9, 2008 order, "[t]here is little case law interpreting the limits of the safety exception on federal preemption." Order at 18, citing *Tillison*, 406 F.3d at 1129. The United States Supreme Court has held that, in order to fall within the safety exception, a statute, regulation, or provision must be genuinely responsive to safety concerns. *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 426 (2002). In other words, a regulation does not fall under the safety exception if it is an economic regulation under the guise of a safety regulation. *Id.* The Supreme Court has also held that the "narrowest possible construction of the exception" is "surely resistible," because the FAAA Act's preemption rule and the safety exception "do not necessarily conflict." *Ours Garage*, 536 U.S. at 441. Instead, the safety exception "seeks to save from preemption state power 'in a field which the States have traditionally occupied.' " *Id.*

In *Am. Trucking*, 559 F.3d at 1054, the Ninth Circuit noted that there is "no bright line test for what is related to vehicle safety" and that the Court is required to ask whether the regulator was "acting out of safety concerns." *Id.*, citing *Tillison*, 406 F.3d at 1129. The Court held that "[i]t is not enough to say that the provision might enhance efficiency, or reduce some kind of negative health effects. The narrow question, again, is whether the provision is intended to be, and is, genuinely responsive to motor vehicle safety." *Id.* at 1055. The Court therefore stated that "even if some kind of general public

health concerns are (or may be) involved in a statute or regulation ... that alone does not bring the regulation within the ambit of the motor vehicle safety exception." *Am. Trucking*, 559 F.3d at 1054. The Ninth Circuit noted:

> On the other hand, regulation of tow truck services has been found to be within the safety exception on the basis that the statutory provisions were "designed to make the towing and removal of vehicles safer." *Tocher*, 219 F.3d at 1051; *see also Tillison*, 424 F.3d at 1104-05 (same). But an ordinance that required tow yards to be within a one-mile radius of the police department was not genuinely responsive to motor vehicle safety concerns. *Loyal Tire*, 445 F.3d at 148. On the contrary, despite its stated safety purpose, the provision in question was designed to exclude out of town businesses from a rotating tow list. *Id.* at 146.

Id. (also noting that in *United States Parcel Serv., Inc. v. Flores-Galarza*, 385 F.3d 9, 13 (1st Cir. 2004), statutes requiring motor carriers to "keep documents and records required by the Treasury Department, pay license fees, submit copies of their corporate officers' criminal records, and post a bond to secure payment of penalties imposed by the Treasury Department" did not fall within the safety exception, and noting that some of the provisions at issue in that case are "hauntingly similar" to those contained in the Concession agreements.)

Other types of regulations that are similar to some of the Concession agreement provisions have been upheld under the safety exception. *See, e.g, Cole v.*

City of Dallas, 314 F.3d 730 (5th Cir. 2002) (regulation conditioning wrecker driver's permit on clean criminal history included within safety exception). *Fife Enterprises v. Washington State Patrol*, 113 Wash. App. 1011 (Wash. App. 2002) (unpub.) ("[s]tate tow operator record keeping requirements generally relate to safety and financial responsibility concerns for purposes of exemption under [the safety exception]"); *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d Cir. 1999) (towing ordinance requiring licensing, display of information, reporting, record keeping, disclosure of criminal history, insurance, posting of bond by towing companies, and maintaining local storage and repair facilities, fell within the safety exception); *Hott v. City of San Jose*, 92 F. Supp. 2d 996 (N.D. Cal. 2000) (holding that regulations requiring liability insurance, criminal background check, displaying of information, reporting, and record keeping were all within scope of safety exception); *Galactic Towing, Inc. v. City of Miami Beach*, 341 F.3d 1249 (11th Cir. 2003) (regulation requiring towing permit upheld under safety exception).

Many of ATA's arguments regarding the various provisions of the Concession agreements are premised on an argument that the safety exception is too narrow to include port "security" concerns.[5] Reply

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[5] In the Court's September 9, 2009 order, the Court stated

> There does not appear to be any case law addressing the question of whether security concerns analogous to the concerns identified by the Ports fall within the safety exception. Some of the cases involving towing have, however, indicated that the safety exception does cover

at 9, citing U.S.A. Amicus Brief at 13, n. 5 (port security concerns do not fall within the safety exception). Specifically, ATA argues that port security is matter that is subject to federal regulation and is not a field that the states have traditionally occupied, which indicates that it does not fall within the ambit of the safety exception. Reply at 10, citing *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 426 (" § 14501(c)(2)(A) evinces a clear purpose to ensure that the preemption of States' economic authority over motor carriers of property not restrict the preexisting and traditional state police power over safety, a field which the States have traditionally occupied."); *id.* at 438 ("It is the expressed intent of § 14501(c)(2)(A) that the preemption rule of § 14501(c)(1) not restrict the existing safety regulatory authority of a State.") (emphasis in original); H.R. Rep. No. 103-677 at 84 (1994) ("nothing in these new subsections [of the FAAA Act, including the safety exception] contains a new grant of Federal authority to a State to regulate commerce and nothing in these sections amends other Federal statutes that govern the ability of States to impose safety requirements").

The Court is unpersuaded by ATA's argument that the fact that a provision may have been implemented in part for "Port security" reasons takes that

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regulations that address safety concerns beyond pure motor vehicle operation safety. For example, the regulations on towing companies upheld in *Tillison* improved safety by reducing "dangerous confrontations" that might result from towing mistakes and 'protect[ed] the vehicle owner from being stranded at a dangerous time and location.' 424 F.3d at 1104.

provision outside of the scope of the safety exception. Instead, pursuant to the Ninth Circuit mandate, the Court examines the individual provisions of the Concession agreements in order to determine whether the intent of the provision was "truly safety." *See Tillison*, 406 F.3d at 1129.

D. Concession Agreement Provisions Addressed by the Ninth Circuit

The Court first examines provisions of the Concession agreements that were specifically addressed by the Ninth Circuit in *Am. Trucking*, 559 F.3d 1046. Each of these provisions is contained in Section 3 of the Concession agreements, under the heading "Concession Requirements."

A. POLA Concession Requirement (d): Driver Hiring (Independent Operator Phase Out)

This provision of the Los Angeles Concession agreement provides in part "[d]river Hiring.... Concessionaire shall be granted a transition period, as set forth in the schedule below, by which to transition its Concession drivers to 100% Employee Concession drivers by no later than December 31, 2013 ("Transition Period")."

The Ninth Circuit held that "the independent contractor phase-out provision is one highly likely to be shown to be preempted." *Am. Trucking*, 559 F.3d at 1056. Specifically, the Ninth Circuit stated:

> the Port of Los Angeles Concession agreement mandates the phasing out of thousands of independent contractors (many or most of them

> small businessmen who own their own trucks). In an attempt to justify this, the Port argues that there are '[s]erious and longstanding safety problems' because of 'unsafe, negligent or reckless driving' that has subjected the Port to 'a risk of financial liability and moral culpability for failure to act to control actions by third parties.' Those concerns would allegedly be ameliorated because requiring employee drivers will provide 'control [to] the concessionaires as employers of their employee drivers to a degree not possible with casual or independent drivers.' We see little safety-related merit in those threadpaper arguments, which denigrate small businesses and insist that individuals should work for large employers or not at all. As it is, the record demonstrates that the Ports' primary concern was increasing efficiency and regulating the drayage market.

Id. at 1055-56.

Based on the holding of the Ninth Circuit, and because it appears that this provision is addressed to concerns unrelated to motor vehicle safety, the Court finds that ATA is likely to succeed on the merits in showing that the provisions of the POLA Concession agreement dealing with the independent operator phase-out are preempted under the FAAA Act, and do not fall within the scope of the safety exception. Therefore, because the Ninth Circuit has also found that the irreparable harm, balance of hardships, and public interest factors also weigh in favor of an injunction, this provision must be enjoined. *See Winter*, 129 S. Ct. At 374.

2. POLA Requirement (d); POLB Requirement (e): Driver Hiring (Hiring Preferences)

The Los Angeles Concession agreement, Requirement (d) provides in pertinent part that "[c]oncessionaire shall give a hiring preference to drivers with a history of providing drayage services to the Port." The Long Beach Concession agreement (e) provides in part "[d]river Hiring. Concessionaire shall give a hiring preference to drivers with a history of providing drayage services in the port."

In *Am. Trucking*, 559 F.3d at 1056, the Ninth Circuit held that

> the job posting and experienced-drivers-first requirement in both Ports' Concession agreements have little or nothing to do with vehicle safety. Although those provisions might have some slight tendency to ensure that drivers have a proven safety record and can be trusted to conduct business at the Ports, it is likely that the Ports are imposing the requirements in order to force drayage carriers to hire certain preferred workers over others, on the theory that new drivers are not as reliable as old drivers. It is a rather blatant attempt to decide who can use whom for drayage services, and is a palpable interference with prices and services.

The Long Beach defendants nevertheless argue that this provision should not be enjoined, arguing that drivers "with more experience operating in and around the Ports can reasonably be expected to increase the likelihood of safe operations over

otherwise equally-qualified inexperienced drivers." Long Beach Opp'n at 20.

Defendants fail to provide evidence to overcome the Ninth Circuit's conclusion that this provision, which addresses driver experience, does not fall within the safety exception. The Court is therefore constrained by the finding of the Ninth Circuit that the driver hiring provisions do not fall within the ambit of the safety exception, and the Court finds that these provisions are likely to be found preempted and must be enjoined.

3. POLA Requirement (n); POLB Requirement (o): Financial Capability

The Los Angeles Concession agreement, Requirement (n) provides:

> Financial Capability. Concessionaire shall demonstrate to the satisfaction of the Executive Director that it possesses the financial capability to perform its obligations under this Concession over the term of the Agreement.

The Long Beach Concession Agreement, Requirement (o) similarly provides:

> Financial Capability. With the exception of licensed motor carriers in good standing on June 1, 2008, all Concessionaires shall demonstrate to the satisfaction of the Executive Director that they possess the financial capability to perform their obligations under this Concession over the term of the Agreement.

The Long Beach defendants argue that this provision is related to safety, because "[f]inancially sound carriers have resources to maintain vehicles in good repair and to implement compliance protocols that ensure safety regulations are being followed."[6] Long Beach Opp'n at 18.

However, in *Am. Trucking*, 559 F.3d at 1056, the Ninth Circuit stated, with regard to these provisions:

> it is not likely that the financial disclosure requirements in both Ports' agreements could be justified under any conceivable safety rationale. Those provisions require disclosures of annual reports, SEC filings, balance sheets, income tax statements, and pending legal actions. The Ports make no effort to explain how a motor carrier's financial viability touches at all on the safety of the motor vehicle.

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[6] The Long Beach defendants also argue that motor carriers are already subject to annual and quarterly financial reporting requirements under Federal law. Long Beach Opp'n at 17, citing 49 U.S.C. § 14123 (requiring annual financial and safety reports to be filed with the Secretary of Transportation, as well as other period reports the Secretary may require); 49 C.F.R. § 369 (governing annual reports by motor carriers). Therefore, the Long Beach defendants argue, the financial requirements as set forth by the Concession agreements would not have any additional effect on motor carriers' "price, route, or service," and, as a result, ATA cannot show a likelihood of success that they will be enjoined. Long Beach Opp'n at 18. Based on the prior findings of this Court and the decision of the Ninth Circuit, however, the Court finds that the provisions of the Concession agreements likely relate to a "price, route, or service" of a motor carrier.

Based on the record before the Court, it cannot conclude that these provisions are likely to fall within the safety exception. Therefore, the Court finds an injunction as to these provisions to be appropriate.

d. POLB Requirement (i): Driver Health Insurance

The Long Beach Concession Agreement, Requirement (i) states that "[c]oncessionaire shall provide proof to the Port that drivers are duly notified of available health insurance programs, including programs identified by the Port."

The Long Beach defendants argue that this provision is related to safety, because drivers who obtain health insurance and have access to medical care will invariably be healthier than those who do not receive such care. Long Beach Opp'n at 22, citing *Public Citizen v. FMCSA*, 374 F.3d 1209, 1217 (D.C. Cir. 2004) ("[H]ealthy drivers presumably cause fewer accidents").[7]

The Ninth Circuit, however, stated that this provision "has no discernable safety purpose." *Am. Trucking*, 559 F.3d at 1056. Based on the Ninth

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[7] The Long Beach defendants also argue that this provision is unlikely to affect the "price, route or service" of a motor carrier, because it does not require motor carriers to provide insurance, but rather only requires motor carriers to inform drivers that health insurance may be available using materials prepared by the Port. Long Beach Opp'n at 22. Based on the prior findings of this Court and the decision of the Ninth Circuit, however, the Court finds that the provisions of the Concession agreements likely relate to a "price, route, or service" of a motor carrier.

Circuit's conclusion and the absence of persuasive evidence to the contrary, the Court finds that this provision does not fall within the safety exception, and therefore is likely preempted.

5. POLA Requirement (f) and POLB Requirement (f): Compliance with Truck Routes and Parking Restrictions

The Los Angeles Concession agreement contains the following provision regarding truck routes and parking restrictions:

> Compliance with Truck Routes and Parking Restrictions. Concessionaire shall submit for approval by the Concession Administrator, a parking plan that includes off street or lawful on-street parking locations for all Permitted Trucks. Concessionaire shall ensure that all Permitted Trucks remain in compliance with the parking plan and all state and local laws and Port tariffs regarding: (1) parking and stopping; and (2) truck routes and permit requirements for hazardous materials, extra-wide, over-height and overweight loads.

The Long Beach provision is substantially similar:

> Compliance with Truck Routes and Parking Restriction. Concessionaire shall submit for approval by the Concession Administrator, an off-street parking plan that includes off-street parking location(s) for all Permitted Trucks. Concessionaire shall ensure that all Permitted Trucks are in compliance with on-street parking restrictions by local municipalities. Permitted

> Trucks not in service shall be staged off public streets and away from residential districts. Concessionaire shall ensure that Permitted Trucks, adhere to any truck routes specified by local and state authorities or the Port, including routes and permit requirements for hazardous materials, extra-wide, over-height and overweight loads.

The Ninth Circuit addressed these requirements, finding that:

> it is likely that the on-street parking ban in the Port of Los Angeles Concession Agreement is not genuinely responsive to safety. While restrictions on parking could be responsive to the safety of drivers and individuals in the surrounding neighborhoods in some sense (though it is not clear how), the Port of Los Angeles bans trucks from parking legally on streets where other trucks are free to park. Thus, any potential safety rationale for restricting on-street parking is seriously undermined, and it is likely that this provision would not withstand scrutiny. Similarly, just how the Port of Long Beach can set out to regulate compliance with parking and truck routes which are not on Port property is a bit of a mystery.

Am. Trucking Ass'n, 559 F.3d at 1056-1057.

ATA also argues that parking within the borders of the Ports can be regulated without a Concession agreement, and that there is "no genuine safety rationale to condition motor carriers' right to enter the Port on parking compliance by individual trucks

either on or off Port property." Mot. at 6-7. The Long Beach defendants, however, argue that the submission of a parking plan unquestionably ensures the safety of motor carriers as well as the public, particularly with regard to motor carriers transporting hazardous materials and over-sized loads. Long Beach Opp'n at 21.

Based on the arguments of the parties and the holding of the Ninth Circuit, it appears that the parking provisions contained within the Concession agreements are insufficiently related to motor vehicle safety so as to fall within the safety exception. Therefore, the Court finds that these provisions are likely to be preempted, and that they must be enjoined.

D. Remaining Concession Agreement Provisions not Specifically Addressed by the Ninth Circuit

The Los Angeles defendants argue that, if the five provisions that the Ninth Circuit found to be objectionable are enjoined, the remaining provisions should not be enjoined, regardless of whether they fall within the safety exception. Specifically, the Los Angeles defendants argue that if the five objectionable provisions are enjoined, ATA cannot show that its members will suffer irreparable injury as a result of the implementation of the remaining provisions of the Concession agreements, or that the balance of hardships and public interest weighs in ATA's favor. Los Angeles Opp'n at 17; *see also* Long Beach Opp'n at 23. In other words, defendants urge the Court to revisit the Ninth Circuit's findings on irreparable harm, balance of hardships, and public

interest in light of the effect of an injunction of the objectionable provisions. Los Angeles Opp'n at 17; *see also* Long Beach Opp'n at 23 ("this Court has full authority to assess anew ATA's showing of irreparable harm, to strike the balance of the equities as favoring or disfavoring the issuance of a preliminary injunction, and to gauge the public interest").

Specifically, defendants argue that if the provisions to which the Ninth Circuit objected are enjoined, the Concession agreement would not place any additional burdens on motor carriers other than (1) burdens associated with the environmental and security aspects of the Clean Trucks Program, which ATA states that it does not challenge, or (2) burdens already imposed by federal and state law. Los Angeles Opp'n at 18. Therefore, defendants argue, there can be no irreparable harm. Los Angeles Opp'n at 18; *see also* Long Beach Opp'n at 23. Furthermore, the Los Angeles defendants argue that if the few objectionable provisions are enjoined, the balance of hardships tips in favor of non-injunction of the remaining provisions, because the remaining aspects of the Concession agreements do not harm ATA, but are necessary to enforce the Ports' Clean Trucks Program and security goals. Los Angeles Mot. at 18. Defendants also argue that because many of the remaining provisions merely enforce pre-existing federal and state law, the Concession agreements further the public interest. Long Beach Opp'n at 24.

The Long Beach defendants also argue that the provisions that only require compliance with existing laws and regulation are not preempted by the FAAA

Act at all, because they have no effect on "price, route, or service" of motor carriers. Long Beach Opp'n at 13, citing *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1188 (9th Cir. 1998) ("state regulation in an area of traditional state power having no more than an indirect, remote, or tenuous effect on a motor carriers' prices, routes, and services are not preempted.").

Based on the prior findings of this Court and the decision of the Ninth Circuit, the Court finds that the provisions of the Concession agreements likely relate to a "price, route, or service" of a motor carrier.

Furthermore, the Court is mindful of the fact that enjoining the particular provisions singled out by the Ninth Circuit could alter the calculus of irreparable harm, the balance of the hardships, and the public interest in this case. As set forth above, the Ninth Circuit mandate clearly requires the Court in this case to consider the individual provisions of the Concession agreements to determine whether they fall within the safety exception and whether they should be enjoined.[8] Therefore, the Court will consider the *Winter* factors in determining whether

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[8] Furthermore, the Court notes that the Ninth Circuit found, that "constitutional violation alone, coupled with the damages incurred, can suffice to show irreparable harm." *See Am. Trucking*, 559 F.3d at 1059. This holding indicates that requiring motor carriers to comply with provisions that are likely to be preempted may, in and of itself, constitute irreparable harm, assuming that such provisions would inflict monetary losses on motor carriers.

individual provisions should be enjoined. *See Winter*, 129 S. Ct. at 374.

1. POLA Requirement (a); POLB Requirement (b): Licensed Motor Carrier

Los Angeles Requirement (a) and Long Beach Requirement (b) provide that "[c]oncessionaire must be a licensed motor carrier in good standing" and in compliance with requirements of a valid license/permit under applicable state or federal permitting regimes.

ATA does not address this provision specifically in its moving papers. The Los Angeles defendants argue that "[i]t is imperative that the Port be allowed to restrict access to its property to only those [licensed motor carriers] that are properly licensed and permitted if the bare minimum of safety and security goals is to be met." Holmes Dec. ¶ 17.a.

The Court concludes that defendants have sufficiently demonstrated that these provisions are likely to fall within the safety exception. Specifically, by ensuring that drayage carriers who may pose a significant safety risk-i.e., those who have not met necessary federal and state licensing and permit requirements-do not access the Ports, these provisions protect the safety of all motor carriers operating motor vehicles at the Ports, as well as other individuals on Port property. Therefore, these provisions are unlikely to be preempted.

2. POLA Requirement (b); POLB Requirement (c): Permitted Trucks

Los Angeles Requirement (b) and Long Beach Requirement (c) require that concessionaires use "permitted trucks." Permitted trucks are those that comply with all of the terms of the Concession agreement.[9] Furthermore, to qualify as a permitted truck, "all Drayage Trucks providing Drayage services operating under [the] Concession shall have required information entered into and kept updated in the Drayage Truck Registry ..." POLA Concession agreement Requirement (b); POLB Concession agreement (c).

ATA states that it does not contest that the Ports may require valid carrier and driver identification information as part of the DTR mechanism, but argues that this requirement can be enforced through existing truck tariffs. However, as stated in Part II.B, *supra*, ATA has not presented any basis for a finding that because certain provisions of the Concession agreements may require compliance with already existing obligations under federal and state law, they necessarily fall outside of the scope of the safety exception. Therefore the Court declines to enjoin these provisions on this basis alone. Instead, the Court turns to the question of whether the

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[9] To the extent that a "permitted truck" is defined as a truck that complies with the provisions of the Concession agreements, for the purposes of this order, such a truck must only comply with the provisions of the Concession agreements that are found herein to fall within the safety exception and to be severable.

provisions are genuinely responsive to safety concerns.

The Los Angeles defendants argue that because ATA does not challenge the legality of the truck ban or the DTR in this suit, the Ports need not show how this Concession requirement genuinely relates to safety. Los Angeles Opp'n at 7. However, the Los Angeles defendants also argue that the provision is in fact related to safety. Los Angeles Opp'n at 7. Los Angeles defendants argue that:

> [w]hile the DTR tracks identifying information for driver and trucks and gives the Marine Terminal Operators ("MTOs") the ability to determine whether a drayage truck seeking entry onto Port property complies with the truck ban, it is the Concession agreements that provide the mechanism to enhance Port security and enforce the Ports' environmental goals by contractually allowing POLA to make one entity, the [licensed motor carrier], which is the entity coordinating drayage truck movements, wholly responsible for providing the DTR information and verifying its accuracy for each truck operating under its concession ... Therefore, the Concession agreement's enforcement of the DTR requirement is directly related to Port security and safety.

Holmes Decl. ¶ 17.b. The Long Beach defendants similarly argue that guaranteeing registration through a Concession agreement allows the Port to enforce safety requirements. Long Beach Opp'n at 14.

The Court agrees with defendants that these provisions appear to be genuinely responsive to safety concerns. Specifically, these provisions provide a mechanism by which the Ports can ensure that only drivers who are identified in the Drayage Truck Registry and who are in compliance with the non-preempted safety-related provisions of the Concession agreements enter Port property, which in turn protects the safety of all motor carriers operating vehicles on Port property, as well as other individuals present. Therefore, these provisions are unlikely to be preempted.

3. POLA Requirement (c); POLB Requirement (d): Driver Compliance

Los Angeles Requirement (c) and Long Beach Requirement (d) mandate that a concessionaire shall be responsible for the compliance and performance of its drivers or other personnel pursuant to the Concession agreement, and that the Port shall have no responsibility or liability in this regard.

The Los Angeles defendants argue that it would be difficult to enforce a truck security program if the Ports lack a direct relationship with the motor carriers who provide drayage services, and if they do not have the ability to hold motor carriers accountable. Holmes Decl. ¶ 17.c. The Los Angeles defendants state that, for example, "requiring all trucks to be registered in the DTR means nothing if those who attempt to skirt the requirement by using a single RFID on multiple trucks can evade identification." Los Angeles Opp'n at 8. The Los Angeles defendants argue that the Concession agreements, and specifically the ability to hold

licensed motor carriers accountable, is the mechanism by which they can enforce the safety measures.[10] Opp'n at 8.

ATA, however, argues that, to the extent these provisions require more than is required by existing law regarding motor carrier vicarious liability, these provisions are preempted for the same reason that the Los Angeles independent-operator phase out is preempted. With regard to the independent operator phase-out provision, the Ninth Circuit rejected defendants' arguments that safety concerns would be addressed by granting "control [to] the concessionaires as employers of their employee drivers to a degree not possible with casual or independent drivers." Mot. at 7; *see Am. Trucking*, 559 F.3d at 1056. ATA further argues that "[t]o the extent any safety concern may be implicated, any attempt to circumvent the DTR, TWIC, or RFID requirements can be detected and enforced while the driver and truck are on Port property, without

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[10] The Long Beach defendants further argue that this requirement does not regulate "price, route, or service." Instead, the Long Beach defendants argue that this provision merely comports with Federal laws and regulations. Long Beach Opp'n at 14-15, citing 62 Fed. Reg. 16370, 16424 (Apr. 4, 1997) ("Carriers are liable for the actions of their employees.... Carriers 'permit' violations of the hours of service regulations by their employees if they fail to have in place management systems that effectively prevent such violations."); 49 U.S.C. § 31132(2) (employee includes "an operator of a commercial motor vehicle (including an independent contractor when operating a commercial motor vehicle"). For the reasons stated above, the Court concludes that the provisions at issue are related to a "price, route, or service" of motor carriers.

imposing additional obligations" on motor carriers. Reply at 20.

The Court finds that this provision is likely to fall within the safety exception. Unlike the independent operator phase-out, this provision appears to be "genuinely responsive to safety," in that it provides an enforcement mechanism by which the Ports can ensure compliance with the safety-related provisions of the Concession agreements.

4. POLA Requirement (e); POLB Requirement (a): Clean Truck Tariff

Los Angeles Requirement (e) and Long Beach Requirement (a) require concessionaires to cause all of their trucks to comply with the Clean Truck Program.

ATA argues that this requirement is unrelated to the safety exception, and also unnecessary, because it is independently enforceable through the use of existing Port tariffs. Mot. at 7.

The Los Angeles defendants argue that ATA has not challenged the Clean Truck Program itself as preempted, and that therefore this provision of the Concession agreement is unlikely to be preempted. Los Angeles Opp'n at 8.

It does not appear that the Ports were "acting out of safety concerns" with regard to these provisions. *See Am. Trucking*, 559 F.3d at 1054. Indeed, the Ports have failed to advance any safety rationale for them. Therefore, these provisions of the Concession

agreements are likely to be preempted, and must be enjoined.

5. POLA Requirement (g), and POLB (g): Truck Maintenance

Los Angeles and Long Beach Requirement (g) requires concessionaires to prepare a maintenance plan for all trucks. This provision further requires that:

> Concessionaire shall be responsible for vehicle condition and safety and shall ensure that the maintenance of all Permitted Trucks, including retrofit equipment, is conducted in accordance with manufacturer specifications. Maintenance records for all Permitted Trucks shall be available for inspection by the Concession Administrator during business hours.

ATA argues that this provision is duplicative of obligations imposed by federal law regarding proper maintenance and inspection on motor carriers with respect to all vehicles subject to their control. Mot. at 8, citing 49 C.F.R. § 396.3 (every motor carrier "shall systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, all motor vehicles subject to its control."). However, as the Court has stated, it does not find this to be a basis to find that a provision is outside the scope of the safety exception, if the provision is genuinely responsive to safety concerns.

ATA further argues that the Concession agreements' maintenance requirements are primarily focused on

pollution control, which do not meet the motor vehicle safety exception. Mot. at 8.

The Los Angeles defendants argue that although this provision does improve the environmental profile of the truck, it is also geared specifically toward safety, because "[i]f routine maintenance, such as tire replacement and brake inspections, is not undertaken, motor carrier accidents occur more frequently and endanger those living near and working on the Ports."[11] Los Angeles Opp'n at 8; Holmes Decl. ¶ 17.e.

The Court agrees with defendants that, while these provision may certainly be responsive to environmental concerns, they are also "genuinely responsive to motor vehicle safety." *See Am. Trucking*, 559 F.3d at 1055. Requiring routine truck maintenance will no doubt help to ensure that drayage trucks are operating properly and safely, which will in turn likely prevent motor vehicle accidents. Therefore, these provisions likely fall within the safety exception and should not be enjoined.

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[11] The Long Beach defendants also argue that this provision is likely satisfied by a motor carrier's pre-existing compliance with Federal maintenance recordkeeping requirements under 49 C.F.R. § 396.3(a) (cited above) and 49 C.F.R. § 396.3(c) ("The records required by this section shall be retained where the vehicle is either housed or maintained for a period of 1 year and for 6 months after the motor vehicle leaves the motor carrier's control."). Therefore, defendants argue, they cannot constitute an additional burden affecting the "price, route, or service" of a motor carrier. Long Beach Opp'n at 15. For the reasons stated above, the Court concludes that the provisions at issue are related to a "price, route, or service" of motor carriers.

6. POLA Requirement (h) and POLB Requirement (h): Compliance with Truck Safety and Operations Regulations

Los Angeles and Long Beach Requirement (h) provides that "[c]oncessionaire shall ensure that all Permitted Trucks are in compliance with all applicable existing regulatory safety standards." The provision further requires concessionaires to "maintain and make available for inspection by the Concession Administrator, all records required for compliance with the Port's Clean Trucks Program and all existing regulatory programs ... [including] driver qualifications, driver training, vehicle maintenance, safety inspection, controlled substances and alcohol testing and hours-of-service for all employee drivers and contractor drivers ..."

ATA argues that this requirement makes motor carriers responsible "to maintain a laundry-list of records for all drivers and trucks, even if not otherwise required by California or federal safety regulations."[12] Mot. at 8. Furthermore, ATA argues

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[12] ATA further argues that the Ports' authority is also subject to the limitations of Cal Veh. Code § 34623(a) ("The Department of the California Highway Patrol has exclusive jurisdiction for the regulation of safety of operation of motor carriers of property") and 49 U.S.C. § 31142(d) ("A periodic inspection of a commercial motor vehicle under the Government standards prescribed under subsection (b) of this section or a program described in subsection (c)(1)(B) or (C) of this section that is being enforced shall be recognized as adequate in every State for the period of the inspection. This subsection does not prohibit a State from making random inspections of commercial motor vehicles."). The Ninth Circuit, however, expressly declined to reach this issue, noting that there is "precious little California authority on the subject" and that the Attorney

that these provisions serve the Ports' administrative convenience, rather than safety. Mot. at 8. ATA argues that the Ports, however, may use tariff and regulatory powers to require trucks and drivers to be in compliance with safety and operational regulations while on Port property. Mot. At 9.

The Los Angeles, defendants, however, argue that this provision has no other purpose besides safety, as it "ensures compliance with an already in-place regulatory framework such that the minimum standards for truck safety are met during such times as the trucks are providing drayage services at the ports."[13] Los Angeles Opp'n at 9.

The Court finds that to the extent that these provisions require motor carriers to maintain and present records regarding "driver qualifications, driver training, vehicle maintenance, safety inspection, controlled substances and alcohol testing and hours-of service for all employee drivers and contractor drivers," these provisions likely fall within the safety exception, because they provide a mechanism by which the Ports can ensure that only

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General of California has submitted an amicus brief in this action in which he disputes ATA's arguments. 559 F.3d at n. 13. In accordance with the Ninth Circuit, the Court finds it unnecessary to determine whether ATA will prevail on this argument.

[13] The Long Beach defendants further argue that this provision does not relate to "price, route or service," because it amounts to a duplication of existing safety laws and regulations. Long Beach Opp'n at 16. For the reasons stated above, the Court concludes that the provisions at issue are related to a "price, route, or service" of motor carriers.

qualified drivers and safe vehicles are operating drayage trucks at the Ports. *See , e.g., Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d Cir. 1999) (towing ordinance requiring, *inter alia*, reporting and record keeping fell within the safety exception). However, to the extent that these provisions require the keeping and reporting of other records, the Court finds that it is not likely that they are sufficiently related to safety so as to save them from preemption under the FAAA Act.

7. POLA Requirement (i); POLB Requirement (j): Driver Credential

Los Angeles Requirement (i) and Long Beach Requirement (j) requires that concessionaires ensure and keep records of driver enrollment in the Transportation Worker Identification Credential (TWIC) program.

ATA argues that this requirement is duplicative of the Federal TWIC requirement, which can be otherwise enforced through Port tariffs. However, as the Court has stated, it does not find this to be a basis for holding that a provision is outside the scope of the safety exception.

The Los Angeles defendants argue that because ATA is not challenging implementation of the TWIC as preempted, the Ports need not show how this provision relates to safety in order to survive injunction. Los Angeles Defendants at 9. However, defendants also argue that "a method of screening drivers and ensuring that each driver has been screened (as opposed to using someone else's TWIC identification) is essential if the Ports are to protect

their property from security threats ranging from terrorist threats to drug trafficking."[14] Los Angeles Opp'n at 10.

The Court finds that these provisions likely fall within the safety exception, because preventing individuals without proper credentials from accessing the Ports will help to protect the safety of both drayage truck drivers and other individuals at the Ports. Therefore, they are unlikely to be preempted.

8. POLA Requirement (j), (m); POLB Requirement (k),(n): Compliance Tags and Technology

Los Angeles Requirement (j) and Long Beach Requirement (k) require that when entering and leaving Port property and while on Port property, concessionaire shall ensure that each truck is equipped with a means of Clean Trucks Program Compliance Verification. Los Angeles Requirement (m) and Long Breach Requirement (n) require that while entering and leaving Port Property, concessionaire shall implement technology required by the Concession or the Clean Trucks Program.

ATA makes no argument about these provisions in its motion. The Los Angeles defendants argue that

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[14] The Long Beach defendants again argue that this provision is not an unlawful regulation of "price, route, or service" because it mirrors the requirements of Federal law. Long Beach Opp'n at 16. For the reasons stated above, the Court concludes that the provisions at issue are related to a "price, route, or service" of motor carriers.

without the "instant access to the DTR information, the Ports would be powerless to gain control over access to their property ... If the DTR information is inaccurate because, for example, drivers are using the same RFID in multiple trucks, the Port loses control over access to its property." Los Angeles Mot. at 10.

Again, because the Ports' ability to limit access to only those drivers and trucks that comply with non-preempted safety-related regulations is directly related to the safety of individuals operating drayage trucks and other individuals at the Ports, the Court finds that these provisions are likely to fall within the safety exception.

9. POLA Requirement (k); POLB Requirement (l): Security

Los Angeles Requirement (k) and Long Beach Requirement (l) require concessionaires to ensure that trucks comply with all security laws and regulations.

ATA argues that these provisions are duplicative of the federal, state, and municipal laws and regulations with which they require compliance, and that this provision could enforced by suspending or revoking motor carriers' interstate operating authority at the ports. Reply at 21. However, as the Court has stated, it does not find this to be a basis to find that a provision is outside the scope of the safety exception.

The Los Angeles defendants argue that this requirement ensures compliance with the existing

legal framework to ensure that port security laws are met by the trucks providing drayage to the ports, and therefore it's primary focus is safety.[15] The Court agrees that the primary focus of this provision appears to be safety. As the Court has stated herein, such provisions prevent individuals who pose a safety risk from accessing the Ports, which protects the safety of both drayage truck drivers and other individuals at the Ports. Therefore, these provisions are unlikely to be preempted.

10. POLA Requirement (l); POLB Requirement (m): Placards

Los Angeles Requirement (l) and Long Beach Requirement (m) mandate that concessionaires "[w]hen entering and leaving Port Property and while on Port Property" post placards on all trucks referring the public to a phone number for the Concession Administrator to report concerns regarding truck emissions, safety, and compliance.

ATA argues that the off-port display of placards is preempted by 49 U.S.C. § 14506(a), which has no safety exception. 49 U.S.C. § 14506(a) provides that "[n]o ... political subdivision of a State ... may enact or enforce any law, rule, regulation standard, or other provision having the force and effect of law that requires a motor carrier ... to display any form

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[15] The Long Beach defendants again argue that this provision has no impact on "price, route, or service" of a motor carrier because it mirrors existing laws. Long Beach Opp'n at 17. For the reasons stated above, the Court concludes that the provisions at issue are related to a "price, route, or service" of motor carriers.

of identification on or in a commercial motor vehicle .... other than forms of identification required by the Secretary of Transportation...."

The Los Angeles defendants, however, argue that in fact, there is no *off-port* display requirement in the Concession agreement. Los Angeles Opp'n at 11. Furthermore, defendants argue that the on-port display requirement is safety-related, because "the enlistment of the public in such a manner is directly related to ensuring the safe operation of motor vehicles and the security of Port property." Los Angeles Opp'n at 11; *see* Long Beach Opp'n at 17. ATA, however, counters that there is no purpose to requiring trucks to carry a placard while on port property, given that they are being tracked according to RFID tag, DTR entries, and TWIC data, and given that members of the public-the alleged targets of the placard information-are not permitted on Port property. Reply at 22.

The Court finds ATA's arguments unconvincing. The primary motivation behind the placards does appear to be motor vehicle safety, in that it provides a mechanism for individuals-including other operators of trucks accessing the Ports-to report unsafe driving or other dangerous activity to the proper authorities. Therefore, the provisions are unlikely to be preempted.

11. Schedule 2, Section 2.1: Concession Fees

Schedule 2, Section 2.1 of both the Los Angeles and Long Beach Concession agreements requires concessionaires to pay an application fee and an annual fee per truck.

ATA argues that "[b]ecause use of the Concession agreement mechanism is preempted, collection of Concession fees is preempted." Mot. at 9. The Long Beach defendants, however, argue that the fees required by both the Los Angeles and Long Beach Concession agreements cover costs of implementing non-preempted Concession agreement provisions. Long Beach Defs' Opp'n at 22. This justification, however, is too tenuous for the Court to conclude that this provision is likely to fall within the safety

exception, and therefore the application fee and annual fee per truck are likely to be preempted.[16]

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[16] At the hearing, defendants argued that the Concession fees should not be preempted, because they are permissible under the line of cases beginning with *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 716, 92 S. Ct. 1349, 31 L. Ed. 2d 620 (1972). In Evansville, the Court held that the Commerce Clause does not prohibit states or municipalities from charging commercial airlines a head tax on passengers, as long as the "toll is based on some fair approximation of use or privilege of use." *Id.* In *Northwest Airlines v. County of Kent*, 510 U.S. 355, 367, 114 S. Ct. 855, 127 L. Ed. 2d 183 (1994), the Court held that "a levy is reasonable under *Evansville* if it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce ..."; applying this test, the Court found the airport fees at issue to be reasonable. *Id.* In *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 290, 107 S. Ct. 2829, 97 L. Ed. 2d 226, by contrast, the Court struck down a state flat tax on operation of trucks on highways, where it discriminated against out of state vehicles, and where the tax did "not even purport to approximate fairly the cost or value of the use of Pennsylvania's roads." In this case, there is insufficient evidence before the Court at this juncture to determine whether the Concession fees approximate the cost or value of use of the Ports and are reasonable under the *Evansville* test. *See* 405 U.S. at 716.

Defendants also noted at the hearing that in some cases in which towing ordinances have been upheld under the safety exception, an application fee provision was included in the upheld ordinance. *See, e.g., Galactic Towing, Inc. v. City of Miami Beach*, 341 F.3d 1249 (11th Cir. 2003) (upholding regulation under the safety exception that required, *inter alia*, an initial application fee and a renewal application fee). However, based on the record before the Court, the Court cannot determine that the fees in this case are sufficiently related to the non-preempted safety-related provisions of the Concession agreements. Of specific concern to the Court is the

12. Schedule 2, Section 2.2 (Reporting Requirements) and 2.3 (Periodic Reviews/Audits)

Schedule 2, Section 2.2, requires concessionaires to update and maintain accurate data in the DTR, Concession Registry, and Driver Registry, and to notify the port of changes to DTR information, concessionaire information, driver lists and status, and "other information as may reasonably be required by the Executive Directors and Concession Administrator." Schedule 2, Section 2.3 requires that the concessionaire agree to allow the Ports to inspect the concessionaire's property and records regarding the concessionaire's compliance with the Concession agreement "while the Concession is in effect and for one year thereafter."

ATA argues that these provisions relate to collection of information and requirements that are themselves preempted. Furthermore, ATA argues that the provision requiring reporting of "other information as may reasonably be required by the Executive Directors and Concession Administrator" is preempted because it is not limited to matters

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fact that the Los Angeles fee is significantly higher than the Long Beach fee, despite the fact that the non-preempted safety provisions of the two Concession agreements are substantially similar. Specifically, under the Los Angeles Concession agreement, concessionaires are required to pay a $2500 application fee and an annual fee of $100 per permitted truck, while under the Long Beach Concession agreement, concessionaires are required to pay only a $250 application fee and an annual fee of $100 per permitted truck. Therefore, the Court cannot determine here that the Concession fee provision is "genuinely responsive to safety."

"genuinely responsive to safety." Mot. at 10. Furthermore, ATA argues that with regard to the provision requiring inspection of concessionaire property, including equipment to perform Drayage Services, "[t]here can be no safety-based reason to require inspection of a motor carrier's entire fleet off Port property (particularly inasmuch as the Ports could perform safety-related inspections of any trucks entering Port property.)" Mot. at 10. ATA further argues that there is no justification for allowing such inspections one year after the Concession agreement has expired.[17] Mot. at 10.

The Long Beach defendants respond that recordkeeping enhances motor vehicle safety because it creates a paper-trail that can aid in tracking compliance with Federal and State safety regulations.[18] Long Beach Opp'n at 18.

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[17] ATA also argues that under 49 U.S.C. § 31142(d), states [including political subdivisions] are required to "recognize[ ] as adequate" inspections of commercial motor carrier vehicles performed under federal standards or by states with approved inspection plans.

[18] The Long Beach defendants again argue that these provisions are not related to the "price, route, or service" of motor carriers, because these provisions do not impose burdens not already imposed by federal law. Long Beach Opp'n at 18, citing 49 C.F.R. § 382.401, 382.403 (reporting and retention of records related to alcohol and drug testing); 49 C.F.R. § 390.29 and 390.31 (general rules on furnishing and keeping records); 49 C.F.R. § 391.51 and 391.53 (rules regarding maintenance driver qualification records); 49 C.F.R. § 395.8(k) (hours of service records); 49 C.F.R. § 396.3(b),(c) (requirements regarding inspection, repair, and maintenance records); 49 C.F.R. § 379, Ap. A (retention of financial, corporate, and transactional records). For the reasons stated above, the Court concludes that

The Court finds that to the extent that this provision allows for inspection of records related to the non-preempted safety provisions of the Concession agreements, while the Concession agreement is in effect, this provision appears to be genuinely responsive to motor vehicle safety. Specifically, it provides a mechanism whereby defendants may track compliance with safety regulations, and ensure that motor carriers are not circumventing these requirements. However, to the extent that it requires the reporting and auditing of additional information, it is preempted. In particular, the requirements that motor carriers notify the Ports regarding "other information as may reasonably be required by the Executive Directors and Concession Administrator" is preempted as too vague to comport with the safety requirement. In addition, the requirement that motor carriers retain records for inspection after the Concession agreement is no longer in effect appears to be too broad to fit within the confines of the safety exception, because ensuring compliance with safety regulations would not appear to promote motor vehicle safety once the trucks are no longer operating at the Ports.

13. Schedule 3: Indemnity and Insurance Requirements

Schedule 3 requires the concessionaire to "indemnify, protect, defend, and hold harmless" the Port, and requires the concessionaire to procure and maintain general liability insurance, automobile liability

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the provisions at issue are related to a "price, route, or service" of motor carriers.

insurance, and workers compensation insurance. It further requires concessionaires to report in writing to the Executive Director any accident or occurrence involving death or injury to any person or damage in excess of $500 occurring on Port property or the Harbor district.

ATA argues that nothing in these provisions is generally responsive to motor vehicle safety.[19] Mot. at 11. The Court agrees that the requirements that the Ports "indemnify, protect, defend, and hold harmless" the Ports, and the requirement that concessionaires report in writing accidents to the Ports do not fall within the safety exception.

However, the Court notes that under the statutory safety exception, the FAAA Act does not "restrict ... the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." *See also Hott v. City of San Jose*, 92 F. Supp. 2d 996 (N.D. Cal. 2000) (holding that municipal regulations requiring liability insurance for tow truck companies were not preempted under the safety exception). This provision applies even if the insurance requirement is not for safety purposes. *See Cal. Dump Truck Owners Ass'n v. Davis*, 302 F. Supp. 2d 1139, 1143

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[19] The Long Beach defendants again argue that this provision does not require additional insurance coverage, but rather requires that the concessionaire comply with relevant Federal and state law, and therefore does not affect the "price, route, or service" of motor carriers. Long Beach Opp'n at 19. For the reasons stated above, the Court concludes that the provisions at issue are related to a "price, route, or service" of motor carriers.

(E.D. Cal. 2002) (holding in *Ours Garage*, 536 U.S. 424 "necessarily implies that a regulation that is not an exercise of 'safety regulatory authority' can nonetheless escape preemption by meeting the requirements in [the 'relating to insurance' clause]"). Therefore, the provisions in Schedule 3 regarding insurance requirements are unlikely to be preempted.[20]

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[20] ATA also argues that Schedule 4, a procedural mechanism which calls for termination of the Concession agreement upon "events of default" by the concessionaire, is preempted. The Court finds that, in general, to the extent this provision requires compliance with non-preempted portions of the Concession agreements, or with regulations related to motor vehicle safety, it is not preempted. However, to the extent that this provision requires termination of the Concession agreements based on violations of preempted provisions, or violations of other non-safety related requirements, it is preempted.

Specifically, with regard to (4.2) Events of Default, section (d) (repeated violations of traffic rules and regulations) and section (e) (any violation of the Patriot Act of 2001 or Department of Homeland Security regulations, including any facility security plan) appear to be genuinely responsive to safety concerns, and therefore likely fall within the safety exception. Section (b) (any failure to comply with the terms and conditions of the Concession) is not preempted, to the extent it requires compliance with non-preempted and severable provisions of the Concession. Section (k) (violation of a Port Tariff, a city Ordinance, a State law, or a Federal law) is likewise not preempted to the extent that it requires compliance with provisions and laws specifically addressed to motor vehicle safety. Section (f) (any fraud or misrepresentation in the Concession application, information or data submitted to the Port required under the Concession) is not preempted to the extent the required information is related to the motor vehicle safety provisions of the Concession agreements.

E. Severability of Non-Safety Related Provisions Preclude Concession Agreements

ATA argues that "once all preempted provisions are excised from the Concession plans, any remaining construct is very different from the scheme contemplated by the Ports. Thus, this Court should avoid the 'task of unscrambling the egg' and find the Concession agreements preempted as a whole." Mot. at 17, citing *United States v. Manning*, 527 F.3d 828, 840 (9th Cir. 2008) (where certain provisions of a statute were preempted, whole statute was preempted, because "excising the most significant conflicts in the statute would result in a very different statute than the one envisioned" and because excising "would require us to examine and rewrite most of the statute in a vacuum as to how the various provisions were intended to intersect and in a way that would be at odds with the purpose of the statute").

The Los Angeles defendants respond that the Ninth Circuit stated that it was "not prepared to hold that every provision must be preempted" and that it would "not direct that the Concession agreements be enjoined in their entirety ..." *Am. Trucking*, 559 F.3d at 1060 (noting that "the agreements contain severance provisions and, in general, those kinds of provisions are respected."); *see also Santa Barbara Sch. Dist. v. Superior Court*, 13 Cal. 3d 315, 330-31, 118 Cal. Rptr. 637, 530 P.2d 605 (1975) (en banc)

The remaining "events of default" appear to be outside the scope of the safety exception, and therefore are likely to be preempted.

(severance is "possible and proper where the language of the statute is mechanically severable, that is, where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words ... [a]lthough not conclusive, a severability clause normally calls for sustaining the valid part of the enactment ..."). The Los Angeles defendants note that the Concession agreements contain separate and distinct paragraphs on distinct topics. Los Angeles Opp'n at 14. Furthermore, the Los Angeles defendants argue that there is no evidence in the record that the provisions identified as likely to be preempted by the Ninth Circuit were of "critical importance" such that the Concession agreements could not be enacted without them. Los Angeles Opp'n at 16.

The Ninth Circuit directed this Court to determine on remand "whether a preliminary injunction should run against all or only a portion of each Concession agreement." *Am. Trucking*, 559 F.3d at 1060. The Ninth Circuit noted that in *United States v. Manning*, 527 F.3d 828, 840 (9th Cir. 2008), a statute with a savings clause was nevertheless preempted in whole, because the "most significant" part of the statute was preempted, and excising those provisions would result in a very different statute. *Id.* The Ninth Circuit noted that, by contrast, in *Nat'l Adver. Co. v. City of Orange*, 861 F.2d 246, 250 (9th Cir. 1988), the court determined that a partial invalidation of an ordinance was appropriate based on the intent of the City and the fact that the remainder of the ordinance could still "function effectively." *Id.* In this case, it appears that enjoining the preempted provisions of the Concession

agreements, which in large part address the types of businesses and trucks that may operate at the Ports, will not prevent the remaining provisions from "function[ing] effectively." *See id.* The non-preempted provisions serve a different purpose-promoting motor vehicle safety-than the preempted provisions, and there does not appear to be any reason that the provisions promoting safety cannot stand independently. Furthermore, the statute in *Manning*, 527 F.3d at 840, is distinguishable, because excising the preempted portions of the statute would have required the court "to examine and rewrite most of the statute." In this case, because the provisions are distinctly separated by topic, excising the preempted provisions is considerably more practicable. Therefore, to the extent the Ninth Circuit directed the Court to determine if the remaining provisions may stand, the Court finds that they can.

Furthermore, the Court finds that, under the standard articulated in *Winter*, an injunction against those provisions that fall within the statutory safety exception is not appropriate because ATA has failed to establish a "likelihood of success on the merits" with regard to those provisions. *See* 129 S. Ct. at 374-75 ("[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.")

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS in part and DENIES in part ATA's motion on remand for entry of preliminary injunction. Specifically, the Court GRANTS ATA's motion with regard to:

(1) POLA Concession Requirement (d): Driver Hiring (Independent Operator Phase Out);

(2) POLA Requirement (d); POLB Requirement (e): Driver Hiring (Hiring Preferences);

(3) POLA Requirement (n); POLB Requirement (o): Financial Capability;

(4) POLB Requirement (i): Driver Health Insurance;

(5) POLA Requirement (f) and POLB Requirement (f): Compliance with Truck Routes and Parking Restrictions;

(6) POLA Requirement (e); POLB Requirement (a): Clean Truck Tariff;

(7) Schedule 2, Section 2.1: Concession Fees[21]

The Court DENIES ATA's motion with regard to:

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[21] At the hearing, defendants inquired as to whether the Ports could implement otherwise preempted provisions of the Concession agreements, if motor carriers voluntarily chose to enter such an agreement in exchange for payment. The Court finds that this issue is outside of the scope of the matters before the Court, and therefore the Court declines to so find.

(1) POLA Requirement (a); POLB Requirement (b): Licensed Motor Carrier;

(2) POLA Requirement (b); POLB Requirement (c): Permitted Trucks;

(3) POLA Requirement (c); POLB Requirement (d): Driver Compliance;

(4) POLA Requirement (g); and POLB (g): Truck Maintenance;

(5) POLA Requirement (i); POLB Requirement (j): Driver Credential;

(6) POLA Requirement (j), (m); POLB Requirement (k),(n): Compliance Tags and Technology;

(7) POLA Requirement (k); POLB Requirement (l): Security;

(8) POLA Requirement (l); POLB Requirement (m): Placards;

With regard to POLA Requirement (h) and POLB Requirement (h): Compliance with Truck Safety and Operations Regulations: The Court DENIES ATA's motion to the extent that these provisions require motor carriers to maintain and present records regarding "driver qualifications, driver training, vehicle maintenance, safety inspection, controlled substances and alcohol testing and hours-of-service for all employee drivers and contractor drivers," but GRANTS ATA's motion to the extent that these

provisions require the keeping and reporting of other records.

With regard to Schedule 2, Section 2.2 (Reporting Requirements) and 2.3 (Periodic Reviews/Audits), the Court DENIES ATA's motion to the extent that this provision requires reporting of information related to motor carriers' compliance with non-preempted safety-related provisions of the Concession agreements while the Concession agreement is in effect. The Court otherwise GRANTS ATA's motion with regard to this provision.

With regard to Schedule 3: Indemnity and Insurance Requirements: The Court GRANTS ATA's motion with respect to all provisions except those regarding insurance (i.e. provisions 3.2-3.8). The Court DENIES ATA's motion with regard to provisions 3.2-3.8.

With regard to Schedule 4, the Court GRANTS in part and DENIES in part ATA's motion, in the manner set forth in footnote 20 herein.

It is ORDERED that a preliminary injunction issue pending the trial herein, or until further order of Court, granting the following relief:

1. The Los Angeles defendants shall refrain and be enjoined from implementing and enforcing Concession Requirements (d); (n); (f); (e); Schedule 2, Section 2.1; and Schedule 3, Sections 3.1 and 3.9.

2. The Long Beach defendants shall refrain and be enjoined from implementing and enforcing

Concession Requirements (e); (o); (i); (f); (a); Schedule 2, Section 2.1; and Schedule 3, Sections 3.1 and 3.9.

3. The Los Angeles and Long Beach defendants shall refrain and be enjoined from implementing and enforcing Concession requirement (h) to the extent it requires motor carriers to maintain and present records on matters other than "driver qualifications, driver training, vehicle maintenance, safety inspection, controlled substances and alcohol testing and hours-of-service for all employee drivers and contractor drivers."

4. The Los Angeles and Long Beach defendants shall refrain and be enjoined from implementing and enforcing Schedule 2, Sections 2.2 and 2.3, except to the extent that these provisions require reporting of information related to motor carriers' compliance with non-preempted safety-related provisions of the Concession agreements while the Concession agreement is in effect.

5. The Los Angeles and Long Beach defendants shall refrain and be enjoined from implementing and enforcing Schedule 4.2(a), (c), (g), (h), (i), and (j). The Court also enjoins the Los Angeles and Long Beach defendants from implementing Schedule 4.2(b) (except to the extent it requires compliance with non-preempted and severable provisions of the Concession agreements), (k) (except to the extent it requires compliance with provisions and laws specifically addressed to motor vehicle safety), and (f) (except to the extent the information it requires is related to motor vehicle safety provisions of the Concession agreements).

IT IS SO ORDERED.

APPENDIX E

United States Court of Appeals,
Ninth Circuit.

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Plaintiff-Appellant,

v.

The CITY OF LOS ANGELES; The Harbor Department of the City of Los Angeles; The Board of Harbor Commissioners of the City of Los Angeles; The City of Long Beach; The Harbor Department of the City of Long Beach; The Board of Harbor Commissioners of the City of Long Beach,
Defendants-Appellees,
Natural Resources Defense Council; Sierra Club; Coalition for Clean Air, Inc., Defendant-intervenors-Appellees.

No. 08-56503.
Argued and Submitted March 4, 2009.
Filed March 20, 2009.

Attorneys and Law Firms

Christopher C. McNatt Jr., Scopelitis, Garvin, Light, Hanson & Feary, LLP, Pasadena, CA; W. Stephen Cannon, Seth D. Greenstein, Stephen S. Anderson, Jr., Constantine Cannon LLP, Washington, DC; Robert Digges, American Trucking Associations, Inc., Arlington, VA, for the plaintiff-appellant.

C. Jonathan Benner, Troutman Sanders, LLP, Washington, DC; Steven S. Rosenthal, Kaye Scholer LLP, Washington, DC, for the defendants-appellees.

David Pettit, Natural Resources Defense Council, Santa Monica, CA, for the intervenors-appellees.

Karyn A. Booth, Thompson Hine LLP, Washington, DC, for the amicus, The National Industrial Transportation League.

Melissa N. Patterson, Department of Justice, Appellate Staff Civil Division, Washington, DC, for the amicus, the United States of America.

Timothy R. Patterson, Office of the Attorney General of California, Oakland, CA, for the amicus, the State of California.

Jeffrey Bossert Clark, Kirkland & Ellis, LLP, Washington, DC, for the amicus, National Association of Waterfront Employers.

Appeal from the United States District Court for the Central District of California, Christina A. Snyder, District Judge, Presiding. D.C. No. 2:08-CV-04920-CAS-CT.

Before ROBERT R. BEEZER, FERDINAND F. FERNANDEZ, and RICHARD A. PAEZ, Circuit Judges.

Opinion

OPINION

FERNANDEZ, Circuit Judge:

INTRODUCTION

American Trucking Associations, Inc. ("ATA"), a non-profit national trade association for the trucking industry, appeals from the district court's refusal to preliminarily enjoin the implementation of mandatory concession agreements for drayage trucking services at the Port of Los Angeles[1] and the Port of Long Beach[2] (together the "Ports"). ATA sought to enjoin the programs as preempted by the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(the "FAAA Act"), because they improperly attempted to regulate the "price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1). The district court concluded that the agreements likely fell within a statutory exception preserving the "safety regulatory authority of a State with respect to motor vehicles." *Id.* § 14501(c)(2)(A). It also concluded that ATA failed to demonstrate irreparable harm absent an injunction and that the balance of hardships and public interest weighed against imposing an injunction.[3] We reverse and remand.

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[1] The Port of Los Angeles is owned and operated by the City of Los Angeles, and management is vested in the Board of Harbor Commissioners of the City (the Los Angeles Board).

[2] The Port of Long Beach is owned and operated by the City of Long Beach, and management is vested in the Board of Harbor Commissioners of the City (the Long Beach Board).

[3] *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 577 F. Supp. 2d 1110 (C.D. Cal. 2008) (*Am. Trucking I*).

BACKGROUND

The Ports of Los Angeles and Long Beach are contiguous and effectively form a single port on San Pedro Bay bisected by the Los Angeles-Long Beach city boundary. They occupy land that was granted by the State of California to the Cities of Los Angeles and Long Beach via the California Tidelands Act, and the Ports hold the land in trust for the benefit of the people of California. Each Port is managed by its respective Board of Harbor Commissioners. The Ports act as "landlords" by developing terminal facilities that are then leased to shipping lines and stevedoring companies. The Ports' revenue comes from fees those operators pay to occupy port space.

The Port of Los Angeles handles more containerized cargo than any other domestic port and the two ports combined handle over 40% of the containerized goods in United States foreign commerce. Motor carriers,[4] like the constituents of ATA (which has tens of thousands of affiliated members), dray this cargo from ships to customers, to off-dock terminals, or to railheads for further transport. Motor carriers do not contract with the Ports; instead, they contract directly with end-users, ocean carriers, railroads, or others in the transport chain. ATA members rely largely on independent truck owner-operators as subcontractors to provide drayage at the Ports. One

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[4] A "motor carrier" is an individual, a partnership, or a corporation engaged in the transportation of goods; those engaged in interstate commerce are subject to, *inter alia*: Department of Transportation regulations; the Motor Carrier Acts, *see, e.g.*, 49 U.S.C. § 13902; and the Motor Carrier Safety Acts, *see, e.g.*, 49 U.S.C. §§ 31136, 31142.

Port study estimated that 85% of drayage drivers are independent contractors, rather than employees, and ATA estimates that number as closer to 98%.

Each Port's respective Drayage Services Concession Agreement ("Concession agreement") requirements went into effect on October 1, 2008, as part of the Ports' Clean Trucks Program. The Program is composed of three main parts: (1) a progressive truck ban that prohibits pre-1989 trucks; (2) the Concession agreements; and (3) a container fee to finance the billions of dollars necessary to subsidize modernizing the truck fleet. The Los Angeles Board's tariff Order No. 6956, adopted at the same time as the resolution approving the Los Angeles Port Concession agreement, states that the Concession agreement was designed to:

(a) further the improvement of air quality at the Port, (b) create an efficient, reliable supply of drayage services to the Port for the sustainable future, (c) establish performance criteria for providers of drayage services that promote the Port's business objectives, (d) ensure sufficient supply of drayage drivers, by improvement of wages, benefits, and working conditions, (e) enhance Port security and safety, and (f) reduce negative impacts on the local community.

The Ports admit that environmental concerns were the "principal motivating factor" of the Clean Trucks Program.[5]

Though similar, the Concession agreements differ in some respects. The Port of Los Angeles Concession agreement requires that motor carriers: (1) remain licensed and in good standing while operating at the Port; (2) enter, verify, and update identifying information for each truck and driver; (3) ensure that permitted trucks are equipped with a Radio Frequency Identification Device to be read when a truck enters a terminal; (4) transition over the course of five years from independent-contractor drivers to employees of each licensed motor carrier;[6] (5) provide off-street parking outside the Port; and (6) submit a maintenance and parking plan for each truck. Each permitted motor carrier must also comply with federal and state law, must obtain automobile liability insurance and worker's compensation insurance, and must agree to safety and security inspections and audits and file numerous reports. Each carrier must pay an initial $2,500 concession fee and a $100 annual administration fee per truck.

The Concession agreement for the Port of Long Beach requires that permitted motor carriers: (1) comply with state and federal law; (2) enter and

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[5] Intervenor-Appellee Natural Resources Defense Council, Inc. ("NRDC") chronicles at length the environmental purposes of the Concession agreements, i.e., to protect the "public health."

[6] The City of Los Angeles Concession agreement requires at least a 20% transition by the end of the fourth quarter of 2009.

update information for trucks and drivers; (3) ensure that permitted trucks are equipped with a Radio Frequency Identification Device; (4) provide proof that it informs drivers of available health insurance; (5) ensure that drivers properly maintain trucks and comply with laws regulating on-street parking and truck routes; (6) maintain general liability and automobile liability insurance; (7) permit safety and security inspections; (8) must agree to audits and file numerous reports; and (9) pay an initial $250 fee and $100 annual fee per truck. The Concession agreement for the Port of Long Beach does not include the provision requiring transition from independent contractors to employee-drivers. Nor does it require off-street parking of trucks.

Both agreements require motor carriers to give hiring preferences to drivers with port service histories and post openings with the Ports' Workforce Development Office. Both agreements require financial disclosures: They compel publicly held companies to disclose annual reports, SEC filings, and pending legal actions, and privately held companies to disclose balance sheets, income tax statements, and pending legal actions.

The Ports claim that the Concession agreements address security concerns. For example, the Ports say that they have little good information on trucks and drivers, and the driver and truck tracking measures address that gap. In the promulgation history of the Clean Trucks Program, the Los Angeles Board stated that the Concession agreement requirement was "designed to assure ongoing safety [and] security" and would yield "increased safety and

security [through] accountability and control of the Concessionaires as employers of their employee drivers to a degree not possible with casual or independent drivers...." Los Angeles Board Resolution 6522. The Port of Los Angeles's Deputy Executive Director stated:

> [T]he drayage concession contracts provide the Port with the tools to better secure itself from threats involving the use of heavy-duty trucks as a means to transport illicit or dangerous materials into or out of the Port. The concession contracts enhance Port security by contractually allowing [the Port of Los Angeles] to: (1) collect identifying information for the driver, the truck, the cargo, and the responsible company for each truck entering [the Port's] terminals; (2) correlate each piece of information with the other pieces for a given truck visit; and (3) make one entity, the [motor carrier], which is the entity coordinating drayage truck movements, wholly responsible for providing the information and verifying its accuracy.

The Los Angeles Board included the independent contractor phase-out based on stated concerns that "[s]erious and long-standing safety problems also exist as a consequence of unsafe, negligent or reckless driving of trucks on the Port or on public roads and highways accessing the Port," and seeks to shift the access and identity tracking to motor carriers because it is "more practical and effective to require that motor carriers enforce such requirements against their own drivers." Los Angeles Board Resolution 6522. The Board justified the

parking restrictions on residential streets because "truck traffic through the nearby neighborhoods has subjected neighborhood residents to adverse impacts from high levels of air pollution, noise, and safety hazards," which would allegedly be "substantially reduced" if drayage trucks "were required to park in designated truck parking areas that are physically separated from residential areas." *Id.*

ATA points out that the actual alleged "safety" features of the Concession agreements are duplicative of requirements already imposed by federal and state law, such as tracking driver information in the Drayage Truck Registry, ensuring compliance with state and federal safety standards, keeping driver records in the federal Transportation Worker Identification Credential ("TWIC") program, and ensuring compliance with state and federal security requirements. ATA does not object to the purport of those elements. ATA's objection lies with the additional components of the Concession agreements, which the Los Angeles Board at one point described as creating a "market characterized by the presence of fewer, generally larger and more stable" licensed motor carriers. Los Angeles Board Resolution 6522.

ATA filed this action on July 28, 2008, claiming that the FAAA Act preempted the Concession agreements[7] and that the agreements unduly

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[7] As relevant here, the FAAA Act provides:

> [A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor

burdened interstate commerce in violation of the Commerce Clause.[8] Soon thereafter, ATA filed a motion for a preliminary injunction to stop the Ports' enforcement of the Concession agreement programs (due to take effect on October 1, 2008). ATA asserted the ground of pre-emption. The district court declined to issue a preliminary injunction. First, in a ruling left unchallenged in this appeal, the district court held that ATA could likely demonstrate that the Concession agreements "related to a price, route, or service" of motor carriers and thus, unless saved by an exception, were preempted by the FAAA Act. *See* 49 U.S.C. § 14501(c)(1). However, without addressing each specific provision of the Concession agreements, the district court held that ATA would not likely show that the agreements were unrelated to regulating the safety of motor carriers, so the agreements were saved by § 14501(c)(2)(A).[9] The district court did find that ATA would likely demonstrate that the Ports were not acting as

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> carrier ... or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1).

[8] U.S. Const. art. I, § 8, cl. 3.

[9] That subsection provides that the preemption provision

> shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

49 U.S.C. § 14501(c)(2)(A).

market participants by implementing the Concession agreements. However, it also concluded that ATA could not demonstrate irreparable harm and that the balance of hardships and the public interest weighed against issuing an injunction.

As of October 1, 2008, any motor carrier out of compliance with a Port's Concession agreement has been barred from entering that Port. ATA claims its members will suffer short-term and long-term capital losses and injuries to business goodwill. Still, some motor carriers have, in fact, entered into Concession agreements.

JURISDICTION AND STANDARDS OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

We review the grant or denial of a preliminary injunction for abuse of discretion. *Lands Council v. Martin*, 479 F.3d 636, 639 (9th Cir. 2007). Our review is " 'limited and deferential,' and '[w]e do not review the underlying merits of the case.' " *Id.* Nevertheless, a district court " 'necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact.' " *Id.* Stated differently, " '[a]s long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case.' " *Wildwest Inst. v. Bull*, 472 F.3d 587, 590 (9th Cir. 2006).

We review the district court's decision regarding preemption and its interpretation and construction of a federal statute de novo. *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1186 (9th Cir. 1998); *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1045 (9th Cir. 2000), *abrogated on other grounds by City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 431-32 (2002).

DISCUSSION

As we have already noted, the question before us is whether we should overturn the district court's denial of a preliminary injunction to ATA. In so doing, we must follow the Supreme Court's recent expatiation on the proper standard for granting or denying that form of relief. *See Winter v. Natural Res. Def. Council, Inc.*, --- U.S. ----, 129 S. Ct. 365 (2008). In *Winter*, the Court reversed one of our decisions, which, it determined, upheld a grant of a preliminary injunction by use of a standard that was much too lenient. *Id.* at ----, 129 S. Ct. at 370. As the Court explained, an injunction cannot issue merely because it is possible that there will be an irreparable injury to the plaintiff; it must be likely that there will be. *Id.* at ----, 129 S. Ct. at 375. It drove that point home when it said: "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at ----, 129 S. Ct. at 375-76. The Court succinctly stated the rule to be as follows:

> A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

Id. at ----, 129 S. Ct. at 374.

To the extent that our cases have suggested a lesser standard,[10] they are no longer controlling, or even viable. The district court applied our pre-*Winter* approach, but because it denied relief that, itself, does not require reversal.

That said, we will now consider the question of whether the Ports' decisions to force motor carriers into the Concession agreements will likely fall before the demands of federal preemption as set forth in the FAAA Act. 49 U.S.C. § 14501(c)(1).[11]

I. Likelihood of Success on the Merits.

The Supremacy Clause provides that: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land ...." U.S. Const. art. VI, cl. 2. State laws that "interfere with, or are contrary to, federal law" are, therefore, invalidated. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498

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[10] *See, e.g., Lands Council*, 479 F.3d at 639.

[11] We decline to consider the amicus brief of National Association of Waterfront Employers, which seeks to raise issues not raised or briefed by the parties, *see Day v. Apoliona*, 496 F.3d 1027, 1035 n. 11 (9th Cir. 2007), and order it stricken.

F.3d 1031, 1039 (9th Cir. 2007) (internal quotation marks omitted).

There can be no doubt that when Congress adopted the FAAA Act, it intended to broadly preempt state laws that were "related to a price, route or service" of a motor carrier. 49 U.S.C. § 14501(c)(1). In so doing, Congress intended to avoid the spectacle of state and local laws reregulating what Congress had sought to deregulate. *See Rowe v. N.H. Motor Transp. Ass'n*, --- U.S. ----, ----, 128 S. Ct. 989, 996 (2008). And, as we have said, "A state or local regulation is related to the price, route, or service of a motor carrier if the regulation has more than an indirect, remote, or tenuous effect on the motor carrier's prices, routes or services." *Tocher*, 219 F.3d at 1047. That the Concession agreements relate to prices, routes or services of motor carriers can hardly be doubted. Thus, we fully agree with the district court that it is likely that ATA will establish that proposition. *See Am. Trucking I*, 577 F. Supp. 2d at 1116-18. In fact, the Ports do not actually dispute that on appeal.

As the district court recognized, that demonstrates a likelihood that ATA will succeed on the merits unless some exception to preemption applies here. We are satisfied that it is likely that no exception applies.

A. *The Non-Statutory Claims.*

The Ports claim that their far-reaching Concession agreements are not preempted because the Ports own the port land; or because they are acting as market participants, even though they are not buyers or sellers of drayage services; or because it is a matter of efficient procurement, even though they

do not procure drayage services; or because, despite the breadth of the regulations they seek to impose on the industry, the Concession agreements are narrow in scope.

We agree with the district court that it is likely that ATA will prevail on those points, and we commend the district court's cogent explanation to the reader of this opinion. *See id.* at 1118-1123.

B. *The Statutory Exception.*

As we noted previously, there is a statutory exception to preemption in this area, that is the preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles...." 49 U.S.C. § 14501(c)(2)(A). That leaves room for some state regulation, but any regulation must be "genuinely responsive to safety concerns." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 442 (2002); *see also Tillison v. City of San Diego*, 406 F.3d 1126, 1129 (9th Cir. 2005). This standard requires that we consider intent. We must ask if the regulator "was acting out of safety concerns." *Tillison*, 406 F.3d at 1129. That is, we must consider whether the purpose and intent was "truly safety." *Id.* But that does not mean that we are required to take the regulator at its word; we need to go further with the analysis. *See Tillison v. Gregoire*, 424 F.3d 1093, 1104 (9th Cir. 2005). We must still decide whether the regulation is genuinely responsive to safety concerns. *See Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 145-47 (2d Cir. 2006).

Moreover, even if some kind of general public health concerns are (or may be) involved in a statute or regulation-for example control of cigarette usage-that alone does not bring the regulation within the ambit of the motor vehicle safety exception. *See Rowe*, --- U.S. at ----, 128 S. Ct. at 996-97. Indeed, if too broad a scope were given to the concept of motor vehicle safety, the exception would swallow the preemption section itself or, at the very least, cut a very wide swath through it.

While there is no bright line test for what is related to vehicle safety, cases to date do give some guidance in that regard. As we have already noted, the Supreme Court has declared that a law which required carriers to meet a number of requirements regarding cigarette delivery had a direct effect on prices and services and was not a regulation of safety. It was preempted. *See id.* at ----, 128 S. Ct. at 995.

Similarly, when Puerto Rico sought to enforce statutes that imposed a number of controls upon motor carriers associated with air carriers, the First Circuit Court of Appeals determined that they were preempted despite a claim that the controls came within a safety exception similar to (actually the same as)[12] the one at hand. *See United Parcel Serv., Inc. v. Flores-Galarza*, 385 F.3d 9, 13 (1st Cir. 2004). The court said:

> He [the Secretary of the Department of Treasury of the Commonwealth of Puerto Rico] urges us to

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[12] *See* 49 U.S.C. § 41713(b)(4)(B)(i).

> conclude that statutes that had required carriers to, *inter alia*, keep documents and records required by the Treasury Department, pay license fees, submit copies of their corporate officers' criminal records, and post a bond to secure payment of penalties imposed by the Treasury Department, fall within this savings clause because they are "directed at precluding carriers from engaging or assisting in illegal conduct." This interpretation does not square with the plain language of [the exception], which addresses the regulation of motor vehicles, and the Secretary cites no authority that persuades us otherwise.

Id. at 13-14. We note that some of the provisions referred to in *United Parcel Service* are hauntingly similar to some of the requirements that the Ports sought to impose here.

On the other hand, regulation of tow truck services has been found to be within the safety exception on the basis that the statutory provisions were "designed to make the towing and removal of vehicles safer." *Tocher*, 219 F.3d at 1051; *see also Tillison*, 424 F.3d at 1104-05 (same). But an ordinance that required tow yards to be within a one-mile radius of the police department was not genuinely responsive to motor vehicle safety concerns. *Loyal Tire*, 445 F.3d at 148. On the contrary, despite its stated safety purpose, the provision in question was designed to exclude out of town businesses from a rotating tow list. *Id.* at 146.

Thus, when preemption is claimed, a court must pay careful attention to the particular provisions that a state or local entity seeks to impose upon motor

carriers. Moreover, the mere fact that one part of a regulation or group of regulations might come within an exception to preemption does not mean that all other parts of that regulation or group are also excepted. *See Tocher*, 219 F.3d at 1050 (holding that although part of the local law was saved under the municipal-proprietor exception to preemption, the remainder of it was preempted). Were it otherwise, a single valid excepted provision would allow a vast amount of nonexcepted provisions to stand. That is not the law. Unfortunately, the district court seemed to believe it was. That led the district court into error, as we will now explain.

We have already set out the list of purposes alleged to support the requirements of the Concession agreements, and have also synopsized the gallimaufry of individual covenants required of the motor carriers. When a court, as it must, assesses each of those provisions, it must ask whether the " 'purported safety justifications' " will withstand scrutiny. Auto. *Club of N.Y., Inc. v. Dykstra*, 520 F.3d 210, 215 (2d Cir. 2008) (per curiam). It is not enough to say that the provision might enhance efficiency, or reduce some kind of negative health effects. The narrow question, again, is whether the provision is intended to be, and is, genuinely responsive to motor vehicle safety. It is rather clear that some, indeed many, of the provisions of the Concession agreements are not likely to live in the light cast by that strobe.

A mere reading of some of the stated purposes of the Los Angeles Board, for example, underscores an extensive attempt to reshape and control the

economics of the drayage industry in one of the largest ports in the nation. One of its goals was to create a market of "fewer, generally larger, and more stable [motor carriers] operating trucks" that may, by adhering to the Ports' emissions requirements, "enjoy competitive advantages if they can earn solid reputations for maintaining green operations." Los Angeles Board Resolution No. 6522. Most notably:

> Maintaining the existing market structure would allow smaller [motor carriers] and [independent contractor-drivers] to maintain unnecessarily dirty operations under the cover of anonymity provided by their large numbers and small size. Requiring that all drivers be employees will also diminish the incentives that smaller [motor carriers] might otherwise have to avoid the true economic costs of their activities, in an effort to compensate for the greater efficiency of larger, more responsible [motor carriers].

Id.

The record also demonstrates that another significant purpose behind the Concession agreements was purely environmental. Some trucks entering the Ports are old and polluting, it was said, and the Ports and surrounding areas suffer from serious air pollution. Thus, the Concession agreements sought to ameliorate those adverse environmental effects by forcing a direct contractual relationship upon the motor carriers, by mandating vehicle maintenance requirements, and by enhancing motor carrier efficiency while creating incentives for concessionaires to use clean and efficient trucks.

In pursuit of these objectives, the Port of Los Angeles Concession agreement mandates the phasing out of thousands of independent contractors (many or most of them small businessmen who own their own trucks). In an attempt to justify this, the Port argues that there are "[s]erious and longstanding safety problems" because of "unsafe, negligent or reckless driving" that has subjected the Port to "a risk of financial liability and moral culpability for failure to act to control actions by third parties." Those concerns would allegedly be ameliorated because requiring employee drivers will provide "control [to] the concessionaires as employers of their employee drivers to a degree not possible with casual or independent drivers." We see little safety-related merit in those threadpaper arguments, which denigrate small businesses and insist that individuals should work for large employers or not at all.

As it is, the record demonstrates that the Ports' primary concern was increasing efficiency and regulating the drayage market. For example, the employee model "is the easiest model to administer" because of the "administrative cost of maintaining up-to-date records" for tens of thousands of independent contractors. Moreover, one of the Port's stated goals was to "ensure sufficient supply of drayage drivers by improvement of wages, benefits, and working conditions." Furthermore, the Port felt that its insistence on that particular employment structure would ensure that the Ports' "investments" in retrofitted trucks "will be better protected" because "Concession motor carriers use only their own employee[s] to drive Port-funded trucks." The

Los Angeles Board also sought to alter the allocation of costs. It said that for independent contractors, the costs are externalized, but if they were employees, the costs would be borne by their motor carrier employers. In short, far from regulating motor vehicle safety, "requiring concession motor carriers to use only their own employees for truck drayage at the Port will contribute to the administrative efficiency and reduce the cost of the Clean Truck Program."

Thus, as we see it, the independent contractor phase-out provision is one highly likely to be shown to be preempted. But there are other provisions that are likely to be preempted as well. For example, the job posting and experienced-drivers-first requirement in both Ports' Concession agreements have little or nothing to do with vehicle safety. Although those provisions might have some slight tendency to ensure that drivers have a proven safety record and can be trusted to conduct business at the Ports, it is likely that the Ports are imposing the requirements in order to force drayage carriers to hire certain preferred workers over others, on the theory that new drivers are not as reliable as old drivers. It is a rather blatant attempt to decide who can use whom for drayage services, and is a palpable interference with prices and services. Neither motor carriers nor their customers (the enormous interstate and foreign shipping industry) would be able to select those with whom they would choose to contract. Port desires for alleged efficiency, not the marketplace, would decide those questions.

Moreover, it is not likely that the financial disclosure requirements in both Ports' agreements could be justified under any conceivable safety rationale. Those provisions require disclosures of annual reports, SEC filings, balance sheets, income tax statements, and pending legal actions. The Ports make no effort to explain how a motor carrier's financial viability touches at all on the safety of the motor vehicle. Similarly, the Port of Long Beach agreement requires motor carriers to notify drivers of available health insurance. Again, this has no discernable safety purpose.

Finally, it is likely that the on-street parking ban in the Port of Los Angeles Concession Agreement is not genuinely responsive to safety. While restrictions on parking could be responsive to the safety of drivers and individuals in the surrounding neighborhoods in some sense (though it is not clear how), the Port of Los Angeles bans trucks from parking legally on streets where other trucks are free to park. Thus, any potential safety rationale for restricting on-street parking is seriously undermined, and it is likely that this provision would not withstand scrutiny. Similarly, just how the Port of Long Beach can set out to regulate compliance with parking and truck routes which are not on Port property is a bit of a mystery.

In short, the district court legally erred in not examining the specific provisions of the Concession agreements, and it is likely that many of those provisions are preempted. The total denial of relief cannot be based on the theory that it is unlikely that

ATA will succeed on the merits in those respects at least.[13]

II. Likelihood of Irreparable Harm.

Although we are of the opinion that ATA has shown the likelihood that it will prevail on the merits, at least as to some of the provisions of the Concession agreements, it is not entitled to relief unless it can also show the likelihood of irreparable harm. The district court determined that ATA could not do so; we disagree.

The district court correctly noted that the motor carriers had two choices: Sign the Concession agreements, or refuse to sign them. If they sign, said the court, the harm will merely be monetary,[14] and that will not usually support injunctive relief.[15] On the other hand, said the court, if they do not sign,

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[13] ATA also argues that to the extent the Ports are attempting to regulate motor vehicle safety, that is preempted by California law, which gives the California Highway Patrol exclusive jurisdiction over "the regulation of safety of operation of motor carriers of property." Cal. Veh. Code § 34623(a); *see also* Cal. Veh. Code § 21. There is precious little California authority on the subject. *See* 47 Op. Att'y Gen. Cal. 191, 192 (1966); *see also United States v. Kiliz*, 694 F.2d 628, 630-32 (9th Cir. 1982). Moreover, the Attorney General of the State of California has filed an amicus brief in which he suggests the contrary. We, therefore, are unable to declare at this stage of the proceeding that ATA will likely prevail on that argument. Nor need we.

[14] *Am. Trucking I*, 577 F. Supp. 2d at 1126.

[15] *See L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980).

any harm is merely speculative,[16] and that, also, will not support injunctive relief, although a loss of goodwill and reputation can do so.[17] We disagree on both counts because it appears that the motor carriers are being put to a kind of Hobson's choice, not entirely unlike that which faced the airlines in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, (1992). There, after deregulation of the airlines, the attorneys general of several states set out to regulate airline advertising and the compensation of passengers who gave up their seats on overbooked flights. *Id.* at 379. The Court pointed to the availability of injunctive relief where there was a threat of imminent proceedings by a state of a criminal or civil enforcement nature against parties who were affected by an unconstitutional act. *Id.* at 380-81. The Court opined as follows:

> As we have described, the attorneys general of seven States, including petitioner's predecessor, had made clear that they would seek to enforce the challenged portions of the guidelines (those concerning fare advertising) through suits under their respective state laws. And Texas law, at least, imposes additional liability (by way of civil penalties and consumer treble-damages actions) for multiple violations.... [R]espondents were faced with a Hobson's choice: continually violate the Texas law and expose themselves to potentially huge liability; or violate the law once as a test case and suffer the injury of obeying the

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[16] *Am. Trucking I*, 577 F. Supp. 2d at 1126-27.

[17] *See Rent-A-Center, Inc. v. Canyon Tele. & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991).

> law during the pendency of the proceedings and any further review.

Id. at 381 (citations omitted).

While the case at hand lacks the precise penalty issues involved in *Morales*, a very real penalty attaches to the motor carriers regardless of how they proceed. That is an imminent harm.

A motor carrier can refuse to sign the likely unconstitutional Concession agreements, and what will ensue, according to the record, is at the very least a loss of customer goodwill-or, indeed, of the carrier's whole drayage business. It is apparent that a carrier could not pick up a customer's goods at the Ports, if it could not even get to those goods. That goodwill would evaporate does not appear speculative at all. In fact, it is likely that all of that part of the carrier's business will evaporate, even if it does other things elsewhere. As to smaller companies that cannot afford the vast increase in capital requirements for the purchase of equipment and personnel expenditures needed to turn independent contractors into employees, the result would likely be fatal. And that means that those smaller carriers, and their employees, and even independent contractors who depend upon them, will be out of work. One wonders why it should be thought that they should just put up with the loss any more than employees of a company should be forced to abide their wrongful termination and the resulting emotional damages and stress that termination causes. *See Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008).

If a motor carrier, however, signs a Concession agreement, or both Concession agreements, its plight is not much better. First, it will have been forced to sign an agreement to conditions which are likely unconstitutional because they are preempted. Second, especially as to the Los Angeles Port Concession agreement, the carrier will be forced to incur large costs which, if it manages to survive those, will disrupt and change the whole nature of its business in ways that most likely cannot be compensated with damages alone. If the Concession agreements were then held to be unconstitutional, it would be faced with either continuing in that form, or, to the extent it could, unwinding that and returning to the old form. Nor is the fact that the Los Angeles Port Concession Agreement employment provision is scheduled to phase in over a five-year period of any help. Even then, employment must equal twenty percent by the end of 2009, but, as ATA points out, that does not mean that a motor carrier can simply flip a switch at the end of 2009 and have employees rather than independent contractors. It will, instead, be forced into making substantial changes commencing immediately. The same is true of requirements for obtaining parking space, and providing reports and information and the like.

As the above underscores, the Los Angeles Port Concession agreement is the most disruptive and is likely to cause the most harm regardless of which choice a motor carrier makes. The Long Beach Port Concession agreement is less so. Still and all, if rejected by a motor carrier, the carrier will face the problems already noted. If accepted, the agreement will likely force the motor carrier to adhere to

unconstitutional conditions and will cause a good deal of economic harm in the interim. But, although there is less disruption, the constitutional violation alone, coupled with the damages incurred, can suffice to show irreparable harm. The Supreme Court has implied as much. *See Morales*, 504 U.S. at 381 (referring to the injury from obeying an unconstitutional law); *see also Nelson*, 530 F.3d at 882 (holding that "constitutional violations cannot be adequately remedied through damages"). In short, motor carriers should not be required to adhere to the various unconstitutional provisions in the Ports' agreements, and are likely to suffer irrevocably if forced to do that or give up their businesses.

We end this part of the discussion essentially where we began, but here with a quotation (or with all of the changes we have wrought, really a paraphrase) of what we said in *Nelson*, 530 F.3d at 881-82 (citations omitted):

> Appellants ... face a stark choice-either violation of their constitutional rights or loss of their[businesses]. The district court erroneously concluded that Appellants will not suffer any irreparable harm because they could be retroactively compensated for any temporary [loss or expenses]. It is true that "monetary injury is not normally considered irreparable," and the [motor carriers] who choose to give up their [businesses] may later be made whole financially if the policy is struck down. However, in the meantime, there is a substantial risk that a number of [motor carriers] will not be able to finance such a principled position and so will be

> coerced into submitting to the allegedly unconstitutional [Concession agreements]. Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm. Moreover, the loss of one's [business] does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of [losses].

Therefore, there is a likelihood of irreparable damages in this case.

III. Balance of Equities; The Public Interest.

In Part II we have outlined the hardships that motor carriers will suffer if, as is likely, many provisions of the Concession agreements are preempted and are, thus, being imposed in violation of the Constitution.

On the other side, it must be admitted that the Ports do have significant concerns, which cannot be ignored. Still and all, with or without the Concession agreements, many other programs and laws designed to alleviate those problems are in existence and are not challenged. For example: The Drayage Truck Registry program, the Transportation Worker Identification Credential program,[18] the remainder of the Clean Trucks Program, the Port Check program and the PierPass program would not be affected. Nor, of course, would any other general laws regarding anti-terrorism considerations, driving, parking, and the environment be affected. Of course,

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[18] 33 C.F.R. § 101.514.

that does not necessarily mean that the Ports could not seek even more protection in a constitutional manner, but it does mean that the hardship to the Ports will be reduced between now and the final resolution of this litigation.

Based on the above, we are constrained to say that the district court abused its discretion when it determined that the balance of hardships weighed in favor of the Port of Los Angeles and the Port of Long Beach.

Similarly, while we do not denigrate the public interest represented by the Ports, that must be balanced against the public interest represented in Congress' decision to deregulate the motor carrier industry, and the Constitution's declaration that federal law is to be supreme. Again, in light of all we have written above, we determine that the district court did abuse its discretion when it declared that issuing a preliminary injunction as to the Concession agreements would not be in the public interest.

Therefore, at this time and on this record we are satisfied that the balance of equities and the public interest do weigh in favor of a preliminary injunction in this case as to at least portions of the Concession agreements.

IV. Severance.

While we think it likely that many of the provisions of the Concession agreements will be preempted and should be subject to the strictures of a preliminary injunction, we are not prepared to hold that every provision must be preempted.

As it is, the agreements contain severance provisions[19] and, in general, those kinds of provisions are respected. *See, e.g., Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1400 (9th Cir. 1991). Thus, we will not direct that the Concession agreements be enjoined in their entirety at this time.

However, we are aware of the fact that if major portions of the agreements are enjoined, it may not be practicable to leave the remaining portions standing. *See United States v. Manning*, 527 F.3d 828, 840 (9th Cir. 2008) (statute had a savings clause, but because the "most significant" parts were excised, the whole was preempted); *see also Nat'l Adver. Co. v. City of Orange*, 861 F.2d 246, 250 (9th Cir. 1988) (partial invalidation of ordinance was appropriate based on the intent of the City and the fact that the remainder of the ordinance could still "function effectively").

We, therefore, leave it to the district court on remand to determine whether a preliminary injunction should run against all or only a portion of each Concession agreement.

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[19] Each provision appears as Part VIII and reads as follows: "Should any part of this Concession be determined by court or agency of competent jurisdiction to be unenforceable, unlawful, invalid, or subject to an order of temporary or permanent injunction from enforcement, such determination shall only apply to the specific provision and the remainder of this Concession shall continue in full force and effect."

CONCLUSION

We conclude that the Concession agreements of both the Ports will likely be found to be preempted in whole or in part. The Port of Los Angeles Concession agreement does overreach considerably more than does the Port of Long Beach Concession agreement. However, each is likely to result in at least some irreparable harm to the motor carriers, and, on balance, the district court abused its discretion when it denied a preliminary injunction as to significant parts of the agreements. While we have pointed to a number of provisions which may be invalid and cause irreparable harm, we, of course, leave it to the district court to decide the validity of each of those in the first instance and to decide the separability of each from the remainder of each Concession agreement. However, we do note that the Los Angeles Port's independent contractor phase-out provision is highly likely to be found preempted and enjoined.

We reverse the district court's decision as to the Concession agreements, and remand for further consideration of the specific terms of each agreement and for the issuance of an appropriate preliminary injunction. The district court shall proceed as quickly as possible so that ATA will not suffer unnecessary harm from any unconstitutional provisions.

REVERSED and REMANDED. No petition for rehearing will be entertained and the mandate shall issue forthwith.

APPENDIX F

United States District Court,
C.D. California,
Western Division.

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Plaintiff,

v.

The CITY OF LOS ANGELES, et al., Defendants.

No. CV 08-04920 CAS (CTx).
Sept. 9, 2008.

Attorneys and Law Firms

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Opinion

ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

CHRISTINA A. SNYDER, District Judge.

I. INTRODUCTION AND BACKGROUND

Defendant City of Los Angeles owns and operates the Port of Los Angeles. Compl. ¶ 12; Opp'n at 4. Defendant City of Long Beach owns and operates the Port of Long Beach. Compl. ¶ 12; Opp'n at 4. The Port of Los Angeles and the Port of Long Beach ("the Ports") form a single contiguous port area along San Pedro Bay in Los Angeles County. Mot. at 4; Opp'n at 2. Authority to manage the assets of the port and craft rules governing port-related activities in each city is invested in defendants Board of Harbor Commissioners of the City of Los Angeles and Board of Harbor Commissioners of the City of Long Beach. Opp'n ¶ 4; Compl. ¶ 8.

Cargo is carried to and from the Ports through a process of "drayage," whereby cargo containers are unloaded from ships and loaded onto truck trailers, from which they are "drayed" by motor carriers to customers, off-dock terminals, or railheads. Compl. ¶ 14. Motor carriers provide these drayage services through contracts with end users of the cargo, or through contracts with ocean carriers. Compl. ¶ 14.

Plaintiff American Trucking Associations, Inc. ("ATA") is the non-profit national trade association for the trucking industry. Compl. ¶ 7. Intermodal Motor Carriers Conference ("IMCC") is an affiliated

conference of the ATA, and counts among its members several motor carriers who provide drayage services to the Ports of Los Angeles and Long Beach. Compl. ¶ 7.

On December 7, 2007, the California Air Resources Board ("CARB") adopted rules to limit the emissions from diesel trucks providing drayage services at California ports. Compl. ¶ 26. Around this same time, the Ports developed a Clean Air Action Plan ("CAAP"). Opp'n at 3. Included in the CAAP was the Clean Trucks Program, a multi-faceted program designed to reduce the emissions of trucks providing drayage services to the Ports. Opp'n at 3.

Under the auspices of the Clean Trucks Program, the Ports adopted tariff amendments mandating that all drayage trucks that service the Ports must meet the Environmental Protection Agency ("EPA") 2007 truck emissions standards by 2012. Opp'n at 6. The Ports also adopted tariff amendments instituting a "Clean Truck Fee," to be paid by the beneficial cargo owner of merchandise leaving the ports, proceeds from which would be used to help finance the retrofits and truck replacements necessitated by the truck ban. Opp'n at 7.

On March 20, 2008, defendant Los Angeles Harbor Board adopted an order which provides that "beginning October 1, 2008, at 8:00 am, no Terminal Operator shall permit access into any Terminal in the Port of Los Angeles to any Drayage Truck unless such Drayage Truck is registered under a Concession from the Port of Los Angeles ..." Compl. ¶ 19. On February 19, 2008, defendant Long Beach Harbor Board similarly mandated that drayage trucks would

be required to hold a concession agreement with the City of Long Beach in order to enter the Port of Long Beach beginning on October 1, 2008. Compl. ¶ 22.

The Los Angeles and Long Beach concession agreements contain many of the same requirements. Specifically, each concession agreement dictates that motor carriers accessing the Port must (1) remain licensed and in good standing; (2) enter, verify, and update identifying information into the Port's Drayage Truck Registry ("Registry") for each truck and for each driver accessing the Port; (3) be responsible for the compliance and performance of their drivers who access the Port; (4) cause all trucks to comply with the Clean Trucks Program; (5) comply with parking restrictions and submit for approval a parking plan for trucks accessing the Port; (6) submit a truck maintenance plan; (7) comply with truck safety and operations regulations, and make available all records required for compliance with existing regulatory programs, including documents on driver qualifications; (8) ensure that each of its drivers has a valid Transportation Worker Identification Card ("TWIC"); (9) ensure that each of its trucks has a Radio Frequency Identification Device ("RFID") connected to the Registry so that the relevant information is available when the truck enters the Port; (10) ensure that all trucks comply with security laws and regulations; (11) ensure that all trucks post placards providing a phone number to allow the public to report emissions and safety concerns; (12) implement necessary technology required by the concession or the Clean Trucks Program; and (13) ensure that they have the financial capability to execute the concession

agreements. Los Angeles Concession Agreement (LACA) at 2-4; Long Beach Concession Agreement (LBCA) at 2-3.

In addition, the Los Angeles concession agreement requires that motor carriers fully transition away from independent contractor drivers, mandating that by December 31, 2013, all of the drivers accessing the port must be employees of the motor carrier rather than independent contractors. LACA at 2. To accomplish this, the concession agreement provides for a gradual phase-in period, with a first benchmark provision requiring that, by December 21, 2009, 20 percent of drivers used by any motor carrier signing a concession agreement be employees rather than independent contractors. LACA at 2-3. The Long Beach concession agreement, by contrast, does not require a transition away from independent contractor drivers, but does require that motor carriers give hiring preference to drivers with a history of providing drayage services to the Port. LBCA at 2.

Under the Los Angeles concession agreement, motor carriers must also pay an initial $2500 refundable fee, with a $100 non-refundable annual administrative fee per truck. LACA at 9. Under the Long Beach plan, motor carriers must pay an initial $250 application fee and a $100 annual administrative fee per truck. LBCA at 7. The two plans also require that motor carriers carry and provide to their drivers varying forms of insurance. Opp'n at 9.

On July 28, 2008, plaintiff American Trucking Association, Inc. ("ATA") filed the complaint in this

action against defendants City of Los Angeles, Harbor Department of the City of Los Angeles, Board of Harbor Commissioners of the City of Los Angeles, City of Long Beach, Harbor Department of the City of Long Beach, and Board of Harbor Commissioners of the City of Long Beach. The first and second claims of the complaint allege that the Los Angeles and Long Beach concession agreements violate the Supremacy Clause and the Federal Aviation Administration Authorization Act of 1994 ("the FAAA"). The third claim alleges that the concession agreements place an undue burden on and discriminate against the right of plaintiff motor carriers to engage in interstate commerce.

On July 30, 2008, plaintiff filed a motion for preliminary injunction on counts one and two of plaintiff's complaint. On August 20, 2008, defendants filed their opposition. A reply was filed on August 29, 2008. A hearing was held on September 8, 2008. After carefully considering the arguments set forth by the parties, the Court finds and concludes as follows.

II. LEGAL STANDARD

A preliminary injunction is appropriate when the moving party shows either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits and that the balance of hardships tips sharply in the moving party's favor. *See Rodeo Collection, Ltd. v. West Seventh*, 812 F.2d 1215, 1217 (9th Cir. 1987). These are not two distinct tests, but rather "the opposite ends of a single 'continuum in which the required showing of harm

varies inversely with the required showing of meritoriousness.' " *Id.* A "serious question" is one on which the movant "has a fair chance of success on the merits." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984).

III. DISCUSSION

A. LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiff argues for a preliminary injunction on the basis that the concession agreements are preempted by the FAAA.

1. STATUTORY BASIS FOR PREEMPTION

"Federal preemption occurs when: (1) Congress enacts a statute that explicitly preempts state law; (2) state law actually conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude the Congress left no room for state regulation in that field." *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1045-46 (9th Cir. 2000), abrogated on other grounds, *Tillison v. City of San Diego*, 406 F.3d 1126, 1127 (9th Cir. 2005). When a statute provides a reliable indication that Congress intended to preempt state and local regulation, "the scope of federal preemption is determined by the statute." *Id.* at 1046.

Congress enacted the FAAA to achieve deregulation of the motor carrier industry, and therefore, included a "broad preemption statute." *Id.* The statute provides that, with regard to motor carriers, "a State, political subdivision of a State, or political authority

of two or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1).

Therefore, for a state regulation to be preempted under 49 U.S.C. § 14501(c)(1), the regulation must be "related to the price, route, or service of a motor carrier that transports property." *Tocher*, 219 F.3d at 1047. Relation to price, route, or service is found where "the regulation has more than an indirect, remote, or tenuous effect on the motor carrier's prices, routes, or services." *Id.*

In *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, ---, 128 S. Ct. 989, 995 (2008), the Court held that a Maine statute dealing with carrier services was preempted under the FAAA. The statute at issue mandated that tobacco retailers could only use carriers for their products who followed certain specific "recipient verification" procedures, for example, procedures to ensure that the person receiving the shipment was of legal age to purchase tobacco. *Id.* The Court held that the statute was preempted because it "related to the price, route, or service" of the carriers. *Id.* Specifically, the Court held that the law, in requiring carriers to provide recipient verification services that they would not otherwise provide, contravened the purpose of the federal law, because it allowed the state, rather than the market, to determine what services motor carriers would provide. *Id.*

The Court in *Rowe* further held that the regulation was not too "tenuous" or "indirect" for preemption to apply, even though the law at issue did not directly

regulate the carriers, but instead only regulated the tobacco retailers with regard to which carriers they could employ. *Id.* at 996; *See Tocher*, 219 F.3d at 1047. Because the *effect* of the regulation would be that carriers would have to offer different services than what the market would otherwise dictate, the law had a sufficient effect on carrier services for preemption to apply. *Rowe*, 128 S. Ct. at 996.

In the instant case, plaintiff argues that, like the statute in Rowe, the concession agreements are sufficiently related to the "price, route, or service" of motor carriers, and that they are therefore preempted. *See id.* at 995. Unlike the statute in Rowe, the concession agreements here do not require that the motor carriers provide a specific service to customers that they would not otherwise provide. *See id.* at 995. Nevertheless, as plaintiff notes, the concession agreements do "establish requirements for motor carriers' hiring decisions, truck routes, parking restrictions, truck maintenance, truck safety, operations regulations, driver health insurance, driver credentials, compliance tags, security, placards posted on trucks, technology, and financial capability." Mot. at 9. Failure to comply with the concession agreements would seemingly have a direct effect on what services the motor carriers could provide, because they would be banned from the Ports, and therefore could not provide drayage services to clients there. *See* Mot. at 15. By contrast, if motor carriers do comply with these requirements, such compliance, which would presumably be costly, would at least likely have an effect on the price of services that the motor carriers charge their customers, and might, as plaintiff

argues, have an effect on the services and routes of the motor carriers as well. *See* Mot. at 15. Thus, like the statute in *Rowe*, the concession agreements may force motor carriers to change their prices, routes, or services in a way that the market would not otherwise dictate. *See* 128 S. Ct. at 996.

Furthermore, unlike the statute in *Rowe*, which regulated carriers only indirectly, but was nevertheless preempted, the concession agreements here directly regulate the carriers themselves, at least to the extent that they wish to access the Ports. *See id.* Therefore, the effect of the concession agreements on "price, route, or service," would likely be sufficiently non-tenuous and direct to warrant preemption. *See Tocher*, 219 F.3d at 1047.

As a result, there is a significant likelihood that plaintiff will succeed in showing that the concession agreements fall within the preemption provision of the FAAA. Indeed, defendants do not seem to dispute this, but instead argue, as discussed below, that they are exempted from preemption.[1]

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[1] Both plaintiff's complaint and *amicus curiae* submitted by the NRF propose 49 U.S.C. § 14504a(c) as an additional basis for statutory preemption of the concession agreements. This statute, added to the FAAA in 2005, states "[I]t shall be considered an unreasonable burden upon interstate commerce for any State or any political subdivision of a State ... to enact, impose, or enforce any requirement or standards with respect to ... any motor carrier or motor private carrier ... in connection with ... (D) the annual renewal of the intrastate authority, or the insurance filings, of the motor carrier or private motor carrier, or other intrastate filing requirement necessary to operate within the state." 49 U.S.C. § 14504a(c). However, neither plaintiff nor amicus movant provide any caselaw

For the foregoing reasons, that Court finds that plaintiff has demonstrated a likelihood of success in showing that 49 U.S.C. § 14501(c)(1) preempts the concession agreements. However, in order for plaintiff to succeed on the merits, the concession agreements must also fall outside the relevant exceptions to preemption.

2. EXCEPTIONS TO PREEMPTION

Defendants argue that the concession agreements are not preempted by the FAAA for three reasons, each of which would be sufficient to defeat preemption. First, defendants argue that the concession agreements are not preempted because the Ports reside on sovereign tidelands, and Congress has not evinced an intent to deprive the states of their sovereignty over these lands. Second, they argue that the concession agreements are not preempted by reason of the market participant exception to preemption. Third, defendants posit that the concession agreements are exempt from preemption under the FAAA's statutory safety exception. Although the Court finds that the concession agreements likely fall outside of the first two exceptions, plaintiff is not likely to succeed in showing that the concession agreements are not exempted from preemption under the safety exception.

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interpreting this provision. Although plaintiff and NRF's argument may have some merit, the Court is not convinced that this statute provides an independent basis for preemption of the concession agreements.

a. SOVEREIGN TIDELANDS

Defendants argue that because the port terminals are "located on sovereign tidelands, granted to the Ports by the State of California," the concession agreements are saved from preemption. Opp'n at 11-12. As part of their sovereign rights over the tidelands, defendants argue, the Ports have "plenary 'management and control' of the property." Opp'n at 13 quoting *Ill. C.R. Co. v. Illinois*, 146 U.S. 387, 452-53 (1892). The " 'power to control, regulate and utilize [navigable waterways and the lands beneath them] is absolute,' except as limited by the federal government's power over navigable waters." Opp'n at 13 (quoting *Colberg, Inc. v. State*, 67 Cal. 2d 408, 62 Cal. Rptr. 401, 432 P.2d 3 (1967)). Defendants argue that these sovereign rights prevent preemption, because "if Congress intends to take away core incidents of state sovereignty, it must make 'unmistakably clear' that it intends to alter the normal federal-state balance with respect to 'historic powers of the States.' " Opp'n at 15, citing *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *Montana v. United States*, 450 U.S. 544, 551-52 (1981). Section 14501, they argue, does not contain an expression of an "unmistakably clear" intent by Congress to diminish the state's authority over its tidelands. Opp'n at 16.

The Court is not convinced that the fact that the Ports rest on sovereign tidelands renders them immune from preemption under the FAAA. First, as plaintiff notes, the Supreme Court has held that the "State's power over the beds of navigable waters

remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce." *Montana v. United States*, 450 U.S. 544, 551 (1981); Reply at 3. Thus, even though the state may have management and control over the lands on which the Ports rest, this right is not absolute. *See* Reply at 3. Congress's power to regulate interstate commerce over navigable waterways supercedes the state's plenary control.

Second, none of the cases cited by defendants regarding the "unmistakable intent" requirement is completely analogous to the instant case. For example, the holding requiring an unmistakable intent in *Montana v. United States* dealt specifically with a question of whether the United States could convey sovereign land. 450 U.S. 544, 551 (1981) (holding that "deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against *conveyance* by the United States, and must not infer such a conveyance 'unless the intention was definitely declared or otherwise made very plain.' " emphasis added). *Gregory* dealt with a factual situation that did not in any way involve sovereign rights to tidelands. 501 U.S. 452, 461 (1991). In *Solid Waste Agency*, the Court required a clear intent, in part because there was a significant constitutional question raised as to whether the administrative interpretation of a federal statute at issue would violate the Commerce Clause. 531 U.S. 159, 174 (2001).

In addition, defendants' argument is weakened by the holding in *Western Oil & Gas v. Cory*, 726 F.2d

1340, 1343 (9th Cir. 1984), in which the Court held that the Commerce Clause preempted regulations by a state regarding leasing of its sovereign tidelands.

For the foregoing reasons, the Court finds that plaintiff would have a significant likelihood of success in showing that the fact that the Ports sit on sovereign tidelands does not exempt them from preemption under the FAAA.

b. MARKET PARTICIPANT EXCEPTION

In cases of statutory preemption, "the market participant doctrine is based on the proposition that 'pre-emption doctrines apply only to state regulation.' " *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 498 F.3d 1031, 1040 (9th Cir. 2007) (emphasis added). Therefore, if state action is proprietary, rather than regulatory, such action is not generally subject to statutory preemption. *Id.* Although the scope of the doctrine may vary depending on the federal statute at issue, "the Court will not 'infer' preemption of proprietary action unless Congress" "indicat [es] ... that a State may not manage its own property when it pursues its purely proprietary interests." *Id.* at 1044.

The Ninth Circuit has held that state action qualifies as proprietary in either of two circumstances. "First, state action is proprietary if it 'essentially reflect[s] the [governmental] entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances.' " *Engine Mfrs.*, 498 F.3d at 1041. Proprietary state action can be saved from preemption if it satisfies this test,

even if it is a "comprehensive" policy with "wide application." *Id.* Second, "state action is proprietary if 'the narrow scope of the challenged action defeat[s] an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem.' " *Id.* This test "protects narrow spending decisions that do not necessarily reflect a state's interest in the efficient procurement of goods or services, but that also lack the effect of broader social regulation." *Id.*

i. "EFFICIENT PROCUREMENT" TEST

Plaintiff's ability to rely upon the market participant exception to preemption depends on the likelihood that the concession agreements could be deemed to reflect the Ports' interest in "efficient procurement." *See id.*

In *Engine Manufacturers*, the state required governmental entities "to purchase, procure, lease, or contract for use of vehicles meeting specified air pollution criteria." *Id.* at 1045. The court held that these provisions were not preempted by the Clean Air Act, because they involved "efficient procurement." *Id.* at 1047, 1050. In interpreting the term "efficient procurement," the court noted that " '[e]fficient' does not merely mean 'cheap.' In context, 'efficient procurement' means procurement that serves the state's purposes which may include purposes other than saving money-just as private entities serve their purposes by taking into account factors other than price in their procurement decisions." *Id.* at 1047. It is therefore immaterial if the state or local entity has "policy goals that it seeks to further through its participation in the market ...

so long as the action in question is the state's own market participation." Opp'n at 27.

Defendants argue that the concession agreements reflect the Ports' interests in "efficient procurement" of drayage services, which serve the critical operational needs of the Ports. Opp'n at 26. The efficiency provided by these agreements, defendants argue, stems from a "recognition that in order to grow and to continue to compete successfully in the market, [the Ports] need to address major environmental and security issues." Opp'n at 22. The concession agreements, therefore, "reflect the Ports' efforts to secure trucking services-services critical to their commercial operation-in a way that will further those objectives." *Id.*

Plaintiff and NRF argue, however, that the Ports are not market participants, because they do not participate in any market relevant to the concession agreements. Reply at 8; Br. for NRF at 12. In other words, the Ports themselves are not procurers of motor carrier services. Instead, the services of motor carriers are procured by end users of the cargo drayed or by ocean carriers, each of whom contract with the motor carriers directly. Compl.¶ 14. Therefore, the concession agreements cannot reflect the Ports' interest in "efficient procurement" of motor carrier services.

Essentially, the question as to whether defendants are acting to "procure" motor carrier services for the Ports, and therefore whether they are exempt under the market participation doctrine, depends on the definition of "the market." If defendants are indeed participants in the market for port services,

including the services of motor carriers, then the concession agreements could be seen as an effort to efficiently procure those services, and therefore the exception would apply. However, if the defendants are not participants in the market for the services of motor carriers, then the exception will not apply. Although case law provides some conflicting indications, the Court finds that, on balance, plaintiff has a significant likelihood of showing that defendants are not participants in the relevant market.

First, it is noteworthy that the Court has stated that for purposes of the market participation doctrine, the "market" should be "relatively narrowly defined." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 98 (1984). "The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further." *Id.* at 97.

In one particularly persuasive case, *Aeroground, Inc. v. City and County of San Francisco*, 170 F. Supp 2d 950, 959 (N.D. Cal. 2001), the court held that defendant airport's requirement that employers of cargo handlers use a card check rule (a specific way for employees to designate their preferred union representative) had a high probability of being preempted and that, therefore, a preliminary injunction was warranted. In finding that the airport's market participant argument did not defeat the request for injunctive relief, the court noted that "the card check rule is not an effort by the airport to contract directly with Aeroground, or other

employers, for goods or services." *Id.* at 957. In other words, the airport's actions could not be said to be a form of "efficient procurement," because the airport was not in the market for cargo-handling services. *Id.* It would be a different case, the court noted, if defendants themselves purchased Aeroground's cargo-handling services. *Id.* at 958. Because the airlines, not defendant airport, purchased Aeroground's services, however, the card check regulation was more akin to a licensing scheme, which controlled the way in which employers of cargo handlers could contract with the various airlines at the airport. *Id.*

The court in *Aeroground* noted the factual similarities of its case to *Golden State Transit Corp v. City of Los Angeles. Id.* at 957; *See Golden State*, 475 U.S. 608 (1986). In Golden State, the Court similarly held that a city requirement conditioning the renewal of taxicab franchises on the settlement of a labor dispute was preempted. *Id.* at 614. In a subsequent Supreme Court case, the Court, commenting on *Golden State*, indicated that the market participant doctrine would likely have applied in *Golden State* if the city had "purchased taxi services from Golden State in order to transport city employees," and, through this procurement activity, had imposed the labor dispute requirement. *Bldg. and Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 227-228 (1993) (hereinafter "*Boston Harbor*").

Furthermore, in *Aeroground*, the court noted that it was insufficient that the genesis of the regulation there at issue was occasioned by the airport's desire

to increase efficiency. 170 F. Supp 2d at 958. "The issue is not whether the government entity operates a business, but whether the law at issue enables the city or state entity to procure goods or services in order to operate as a business." *Id.* at 958. Therefore, even if the rule were intended only "as a device for increasing the airport's revenues," not for any substantive policy reasons, the market participant exception would not necessarily apply, as "simply addressing the financial interests of a public entity does not make such efforts those of a market participant." 170 F. Supp. 2d at 958.

Therefore, *Aeroground* suggests that plaintiff in the instant action has a significant likelihood of showing that the market participant exception does not apply to the concession agreements. Like the airport and the cargo handlers in *Aeroground*, the ports and motor carriers do not contract directly for the provision of motor carrier services. *See id.* at 957. Instead, the concession agreements, like the regulations in *Aeroground*, are akin to a licensing scheme, whereby the Ports license the motor carriers to do business at the ports, provided that they follow certain regulations. *See id.* at 958.[2] Under

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[2] It is true that a few Commerce Clause preemption cases suggest that an entity does participate in the market when it provides facilities to entities, who in turn provide their services to others. *See, e.g., Transport Limousine of Long Island, Inc. v. Port Auth. of N.Y. and N.J.*, 571 F. Supp. 576, 581 (E.D.N.Y. 1983) (Port Authority's imposition of fees on limousine services in exchange for counter space did not conflict with the Commerce Clause, because Port Authority was acting as a "participant in the market for ground transportation services because it provided facilities to limousine services."); *Four T's, Inc. v. Little Rock Mun. Airport Com'n*, 108 F.3d 909, 913 (8th

Aeroground, such a system would fall outside of the scope of the "efficient procurement" test for the market participation exception.

Defendants attempt to distinguish *Aeroground* on the ground that the policies at issue there were imposed by the airport through a rule, rather than an agreement between the parties. Opp'n at 28. Therefore, they argue, the behavior at issue in *Aeroground* was on its face more akin to a regulation than market participation. Opp'n at 28. However, there is no indication that the *Aeroground* court found the context in which the condition was issued to be dispositive of the analysis. Furthermore, defendants' argument is weakened by the fact that in *Golden State*, the preempted action was a refusal by defendant city to issue a franchise renewal, rather than a regulation promulgated by the city. 475 U.S. 608, 609.

Defendants also argue that *Aeroground* was wrongly decided to the extent that it held that conduct that does not involve "procurement" is outside of the market participant exception. Opp'n at 28. For example, defendants cite *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980), in which the Court determined that the market participant exception applied to discriminatory practices by the state regarding the *sale* (rather than procurement) of cement.

Cir. 1997) (airport's fee schedule for car rental companies operating in the terminal did not violate the Commerce Clause, because the airports, in providing facilities to the rental companies, were "participating in the rental car market.") However, these cases do not persuade the Court that the concession agreements are subject to the market participant exception.

Defendants also cite dicta in *Boston Harbor*, where the Court stated that "when a State owns and manages property, for example, it must interact with private participants in the marketplace," and in doing so, its behavior cannot be deemed to be "regulation" subject to preemption. 507 U.S. 218, 227 (1993). Finally, defendants point out that the Supreme Court has stated that the market participation exception "does not require the city to stop at the boundary of formal privity of contract." *White v. Mass. Council of Constr. Emplrs.*, 460 U.S. 204, 211 (1983).

However, at issue in *Boston Harbor* was a contract between a government agency charged with providing certain water-supply services and individual contractors who supplied those water supply services. *Id.* at 231. The agency, therefore, was acting as a "purchaser" in the market for contractors. *Id. White* involved requirements imposed by the City of Boston on the hiring practices of construction contractors with whom it contracted. 460 U.S. at 206. When the Court held that the market participant exception extends beyond "privity of contract," it was referring to the effect of the requirements on the employees of the public contractors, contractors from whom the City procured services. *See id.* at 211. Neither *Reeves*, nor *Boston Harbor*, nor *White* dealt with a situation presented by the instant case, where the defendant is not acting as a direct buyer or seller in the market at issue.

Furthermore, a recent decision from the Southern District of Florida with similar facts to the instant

action provides a persuasive argument in favor of plaintiff's contentions herein. In *Florida Transportation Service, Inc. v. Miami-Dade County*, 543 F. Supp. 2d 1315, 1327 (S.D. Fla. 2008), plaintiffs brought a Commerce Clause challenge to the Port of Miami's limitations on the number of permits that would be given to stevedores to work the port. The court held that the market participant exception did not apply, because the county was "not a 'participant' in the stevedore market." *Id.* at 1332. The court found that although the county managed the Port, it did not offer stevedore services or hire stevedores. *Id.* Furthermore, although the Ports competed with other ports, the market at issue was not the market for port services, but rather the market for stevedores. *Id.*

ii. "NARROW SCOPE" TEST

Under the second market participant test employed by the Ninth Circuit, "state action is proprietary if 'the narrow scope of the challenged action defeat[s] an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem.'" *Engine Mfrs.*, 498 F.3d at 1041. This test "protects narrow spending decisions ... that lack the effect of broader social regulation." *Id.*

Defendants argue that the Ports' concession agreements are applicable only in narrow circumstances. Specifically, the concession agreements apply only to drayage services on Port land "for purposes directly related to the Ports' commercial operations on the land." Opp'n at 29. The "specific proprietary problem" faced by the Ports is

"how to make the Ports more competitive in the future while ensuring that environmental and safety/security concerns raised by drayage trucks are effectively addressed so that the Ports' neighbors do not impede efforts to maximize the Ports' commercial success." Opp'n at 30.

Although the concession agreements do address specific proprietary problems faced by the Ports, it is questionable whether the concession agreements would fall under the "narrow scope" test. *See Engine Mfrs.*, 498 F.3d at 1041. First, the test was designed to protect "narrow spending decisions," which the concession agreements almost certainly are not. Second, the agreements may not be sufficiently "narrow," as they contain numerous provisions regulating different aspects of the motor carriers' services, and apply to all motor carriers wishing to access the Ports.

Given the problems associated with characterizing the concession agreements as "efficient procurement" or "narrow" in scope, there is a significant likelihood that plaintiff will succeed in showing that the market participant exception to preemption does not apply in this case.

c. THE "SAFETY EXCEPTION"

The provision of the FAAA preempting state regulation "related to the price, route, or service of a motor carrier that transports property," contains an express exception to preemption. *See* 49 U.S.C. § 145019(c). Specifically, this section holds that the preemption provision "shall not restrict the safety

regulatory authority of a State with respect to motor vehicles ..." 49 U.S.C. § 14501(c)(2)(A).

16 "There is little case law interpreting the limits of the safety exception on federal preemption." *Tillison*, 406 F.3d at 1129. However, the United States Supreme Court has specified that, in order to fall within the safety exception, a statute, regulation, or provision must be genuinely responsive to public safety concerns. *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 426 (2002). A regulation does not fall under the safety exception if it is an economic regulation under the guise of a public safety regulation. *Id.* Therefore, the *Tillison* court held "our focus in a preemption case like this one is whether the purpose and intent of the body passing the law at issue, whether state or municipality, was truly safety." 406 F.3d at 1129.

However, the Supreme Court has also held that the "narrowest possible construction of the exception" is "surely resistible," because the FAAA preemption rule and the safety exception "do not necessarily conflict." *Ours Garage*, 536 U.S. at 441. Instead, the safety exception "seeks to save from preemption state power 'in a field which the States have traditionally occupied.'" *Id.*

Defendants argue that the safety exception applies to the concession agreements, because the agreements were "intended in some substantial measure to achieve enhanced Port safety and to address gaps in Port security." Opp'n at 38. According to defendants, the concession agreements address some "traditional" safety concerns, such as "concerns that older trucks may pose road hazards that newer

trucks do not pose" as well as concerns related to "Port security." Opp'n at 38. For example, defendants state that they currently lack any information or records about motor carriers entering the Port, and that the concession agreements address this security concern by allowing the Ports to track the identity of drivers and by holding the drivers accountable to the Ports' rules. Declaration of Dr. Geraldine Knatz ¶ 36-38.

There does not appear to be any case law addressing the question of whether security concerns analogous to the concerns identified by the Ports fall within the safety exception. Some of the cases involving towing have, however, indicated that the safety exception does cover regulations that address safety concerns beyond pure motor vehicle operation safety. For example, the regulations on towing companies upheld in *Tillison* improved safety by reducing "dangerous confrontations" that might result from towing mistakes and "protect[ed] the vehicle owner from being stranded at a dangerous time and location." 424 F.3d at 1104.

Plaintiff contends that the safety exception does not apply to the concession agreements. First, plaintiff argues that the "Department of the California Highway Patrol has exclusive jurisdiction for the regulation of safety of operation of motor carriers of property," and therefore the Ports and the cities of Los Angeles and Long Beach lack authority to impose motor carrier regulations. Mot. at 18; Cal. Vehicle Code § 34623(a). This argument is unconvincing, as the safety regulations at issue are not purely related to the "safety of *operation* of motor

carriers of property," but rather address broader concerns more tangentially related to the operation of motor carriers and not under the authority of the California Highway Patrol, such as the security of the Ports. *See* Cal. Vehicle Code § 34623(a) (emphasis added). Furthermore, defendants point out that the Ports have independent authority to address safety and security issues, granted by both of the city charters, which give them the authority to make and enforce necessary rules and regulations governing the Ports. Opp'n at 42. Moreover, defendants argue that the California Highway Patrol's " 'exclusive authority' as a general matter over truck safety cannot reasonably be construed to prohibit a landowner, whether private or public, from adopting safety-related rules for vehicles seeking entry onto their property." Opp'n at 43.

Plaintiff next argues that the Supreme Court's holding in *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954), precludes the application of the safety exception in this case. In Castle, the Court held that under the Federal Motor Carrier Act, a state could not punish a motor carrier for repeated violations of safety standards by suspending the motor carrier's right to engage in interstate commerce over the state's roads. *Id.* at 63-64. However, this case was decided forty years before the passage of the FAAA and the safety exception, and involved a significantly different factual scenario than the one at issue.

In addition, plaintiff contends that the concession agreements do not fall within the safety exception, because "the Ports concede that the Plans go beyond safety and security to environmental regulation-a

matter well outside the purview of the claimed exception." Reply at 16. However, case law examining the safety exception does not indicate that regulations have to have been passed for the exclusive purpose of promoting safety. As long as the "purpose and intent ... was truly safety," the safety exception may apply. *See Tillison*, 406 F.3d at 1129.

Plaintiff also contends that the concession agreements do not fall within the safety exception, because certain security measures, namely the Registry and the Federal Transportation Worker Identification Credential ("TWIC") Program, will be implemented regardless of whether or not the concession agreements are enjoined. Reply at 18. However, this assertion is not sufficient to show that the concession agreements could not fall within the safety exception. Defendants have indicated that "the security measures that are integrated into the concession contracts cannot be implemented independently of the concession program" and that delays in implementation of the concession contracts "will result in further delay in the Port's ability to implement security measures protecting the Port and will make it impossible to rapidly and effectively mitigate a known security vulnerability." Opp'n at 48; Declaration of John R. Holmes ¶ 44.

Finally, plaintiff's argument that the Ports' security regulations are preempted by regulations of port security contained in § 102 of the Maritime Transportation Security Act (codified at 46 U.S.C. § § 70107-17) and the Security and Accountability for Every Port Act of 2006 (Pub. L. No. 109-347) is not persuasive. Plaintiff argues that these regulations

occupy the entire field of port security, but yet plaintiff only identifies one provision covering port trucking, which merely directs the Secretary of Homeland Security to implement a threat assessment screening device for drivers accessing ports. *See* 6 U.S.C. § 924. Although the legislative history shows some intent to preempt state regulations that *conflict* with these federal regulations, it does not evince any intent to preempt all state regulations not inconsistent with the regulations in the field of port trucking. *See* Fed. Reg. 60448, 60468 (Oct. 22, 2003). ("We have determined that it would be inconsistent with the federalism principles stated in the Executive Order to construe the MTSA as not preempting State regulations that conflict with the regulations in this final rule.")

Based on the foregoing, the Court finds that the defendants have shown that there is a significant probability that the concession agreements fall under the safety exception to the FAAA, and that they may therefore be saved from preemption. As a result, the Court finds that plaintiff has failed to show any, and certainly not a substantial, likelihood of success on the merits.

B. IRREPARABLE HARM

Plaintiff argues that its members will suffer irreparable injury if the concession agreements are not enjoined. Much of the harm that plaintiff alleges stems from the costs in complying with the concession agreements. For example, plaintiff alleges that ATA members who sign the concession agreements will have to incur the costs needed to

"prepare parking and maintenance plans, purchase placards and identification technology, and undertake administrative tasks relating to truck maintenance, truck safety and operations, driver health insurance, driver credentials, and financial capability." Mot. at 27. Furthermore, they claim that "ATA members that refuse to sign the Concession Agreements will suffer immediate direct financial loss." Mot. at 25. However, although plaintiff might incur various forms of costs from the implementation of the concession agreements, "monetary injury is not normally considered irreparable." *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980). Therefore, to make a showing of irreparable harm, plaintiff will need to show harm beyond monetary injuries.[3]

Plaintiff alleges that two types of non-monetary harm will result if the injunction is not granted. First, plaintiff alleges that if an ATA member chooses not to sign the concession agreement, its subsequent inability to access the ports will cause their ongoing relationship with their customers to

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[3] Plaintiff argues that, because defendants "threaten to foreclose such relief by invoking their Eleventh Amendment rights as to tidelands trustees for California," ATA members may not be able to recover monetary damages. Reply at 24. Because the Court has herein found that defendants are not likely to succeed on the tidelands trust argument, the Court finds that damages for monetary injury are unlikely to be foreclosed. Plaintiff also argues that "immediate financial harms would be irreparable" because Supremacy Clause actions only bring injunctive and declaratory relief. Mot. at 28. However, plaintiff does not provide any support for this proposition, and the Court believes that monetary relief will be available to ATA members under some theory.

suffer, and as a result, they will lose goodwill and the reputation they have built up with their clients. Mot. at 26. The Ninth Circuit has held that injury to goodwill and reputation can indeed constitute irreparable harm. *Rent-A-Center Inc. v. Canyon Tele. & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991); *Citicorp Services, Inc. v. Gillespie*, 712 F. Supp. 749, 754 (C.D. Cal. 1989).

However, in this case, although there is some chance that ATA members could experience a loss of goodwill, the possibility is speculative and not sufficient, alone, to constitute irreparable injury. First, it is significant to note that the loss of goodwill plaintiff alleges will occur only if an ATA member chooses not to sign the concession agreement. Thus the loss of goodwill is avoidable if ATA members choose to sign the agreement, knowing that, if plaintiff's action is ultimately successful, they may receive financial compensation for the injuries incurred. *C.f. Citicorp Services, Inc. v. Gillespie*, 712 F. Supp. 749, 754 (C.D. Cal. 1989) (plaintiff would suffer irreparable injury from loss of goodwill from being barred, by statute, from entering the escrow transactions market in California). It is not clear how many ATA members would actually choose to not sign the concession agreements. Plaintiff has only submitted one declaration from a motor carrier executive evincing any intent to forgo signing a concession agreement; however, the declarant only "tentatively" intends to forgo signing the Los Angeles concession agreement, and not the Long Beach concession agreement, due to the Los Angeles concession agreement's requirement that motor carriers transition to an all-employee workforce.

Declaration of Gregory L. Owen ¶ 32. This particular provision does not take effect fully until December 2013, with the first incremental step (20 percent employee workforce) not implemented until December 2009. *See* LACA at 3. Because this provision is significantly delayed in taking effect, and motor carriers can make their decision on whether to sign the concession agreements in the interim, plaintiff's argument that loss of goodwill will result from failure to immediately enjoin the agreement is too speculative to justify immediate injunctive relief.

Likewise, plaintiff's second argument for non-monetary injury-that motor carriers might be driven out of business if they choose to sign only the Long Beach agreement, but not the Los Angeles agreement-is also insufficient, because the only reason cited for this potential outcome is the Los Angeles independent contractor phase-out. *See* LACA at 3; Reply at 23-24. Again, because this does not begin to take effect for another year, plaintiff has not shown that a preliminary injunction is necessary to prevent motor carriers from suffering irreparable harm caused by going out of business.

Plaintiff also argues that because the concession agreements violate the Supremacy Clause of the Constitution, harm should be presumed. The Ninth Circuit has indeed stated that "unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." *Nelson v. Nat. Aeronautics & Space Admin.*, 530 F.3d 865, 882 (9th Cir. 2008). However, the court has indicated

that this presumption is not automatic. *See, e.g.*, *Associated Gen. Contractors, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991) (indicating that it is the court's role to determine whether a party alleging a constitutional infringement "is entitled to such a presumption of harm"); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702 ("We have stated that an alleged constitutional infringement will often alone constitute irreparable harm.") (emphasis added). In the case of Supremacy Clause violations, such a presumption is not necessarily warranted. For example, in *Golden Gate Restaurant Ass'n v. San Francisco*, in which plaintiffs challenged a municipal ordinance on the grounds that it was preempted by the federal Employee Retirement Income Security Act, the Court did not presume irreparable injury and instead held that plaintiff's injury was "entirely economic." 512 F.3d 1112 (9th Cir. 2008).

Courts have generally held that a presumption of harm is warranted in cases where there was also an actual harmful effect. For example, in *Nelson*, the Court held that harm should be presumed. In that case, plaintiffs faced a choice of either losing their jobs, or keeping their jobs and being forced to submit to a potentially unconstitutional background check, both of which, the court concluded, constituted actual irreparable harm. 530 F.3d at 882. Likewise, in *Citicorp*, the Court stated that a presumption of irreparable harm was "warranted" in part because the plaintiff had shown actual irreparable harm. 712 F. Supp. at 753-54. Because plaintiff has not shown sufficient irreparable harm in this case, a presumption of irreparable harm is not warranted.

C. BALANCE OF HARDSHIPS

The balance of hardships in this case weighs in favor of defendants. The Ninth Circuit has indicated that injuries involving "preventable human suffering" outweigh those that are entirely economic. *See Golden Gate Restaurant*, 512 F.3d at 1125. As discussed herein, plaintiff has shown what is principally monetary harm that will probably result from implementation of the concession agreements.

Defendants, by contrast, could stand to incur significant non-monetary irreparable harm if the concession agreements, and the safety and environmental protection measures they contain, are enjoined. For example, although plaintiff argues that certain security-related provisions, such as the TWIC and the Registry, will be implemented regardless of whether the concession agreements are enjoined, the Ports nevertheless may experience significant hardships without the agreements, because the agreements allow the Ports to directly enforce the various security provisions against individual motor carriers, and to hold motor carriers responsible for the actions of their drivers. *See, e.g.*, Holmes Decl. ¶ 42-43. Furthermore, enjoining the concession agreements may hinder the ability of the Ports to hold motor carriers responsible for failure to comply with the Clean Trucks Program. *See, e.g.*, Knatz Decl. ¶ 31. Because a compromise in Port security and in the ability to enforce the Clean Trucks Program could both potentially lead to "preventable human suffering," the Court concludes that the balance of hardship tips in favor of defendants. *See Golden Gate*, 512 F.3d at 1125.

D. PUBLIC INTEREST

Here, the public interest, like the balance of hardships, weighs in favor of denying an injunction. The public has a significant interest in ensuring that the Ports are safe from security concerns. Enjoining the concession agreements would have the potential to compromise security measures contained therein, which could significantly harm the public interest in secure ports. Furthermore, the public also has an important interest in ensuring that the environmental benefits from the Clean Trucks Program are implemented, and enjoining the concession agreements could limit defendants' ability to enforce provisions of the program. *See* Opp'n at 49. Granting an injunction, by contrast, would not serve the public interest in any significant way.

IV. CONCLUSION

Plaintiff has not demonstrated a likelihood of success in showing that there is not an exception to preemption under the FAAA by reason of the safety exception. Furthermore, plaintiff has not demonstrated that failure to grant the injunction will result in irreparable injury. Finally, the balance of hardships and the public interest tip decidedly in favor of denying the injunction. For the foregoing reasons, the Court DENIES plaintiff's motion for preliminary injunction.

IT IS SO ORDERED.

APPENDIX G

Article. VI.

U.S. CONST. art. VI, cl. 2 provides in relevant part:

Article. VI.

* * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

APPENDIX H

49 U.S.C. §14501(c) provides in relevant part:

§14501. Federal authority over intrastate transportation

* * *

c) MOTOR CARRIERS OF PROPERTY.—

(1) GENERAL RULE.—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) MATTERS NOT COVERED.—Paragraph (1)—

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the intrastate transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

(3) STATE STANDARD TRANSPORTATION PRACTICES.—

(A) CONTINUATION.—Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to—

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent-van line operations (as set forth in section 13907), if such

law, regulation, or provision meets the requirements of subparagraph (B).

(B) REQUIREMENTS.—A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if—

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this part or a regulation issued by the Secretary or the Board under this part; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) ELECTION.—Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

(4) NONAPPLICABILITY TO HAWAII.—This subsection shall not apply with respect to the State of Hawaii.

(5) LIMITATION ON STATUTORY CONSTRUCTION.—Nothing in this section shall be construed to prevent a State from requiring that, in the case of a motor vehicle to be towed from private property without the consent of the owner or operator of the vehicle, the

person towing the vehicle have prior written authorization from the property owner or lessee (or an employee or agent thereof) or that such owner or lessee (or an employee or agent thereof) be present at the time the vehicle is towed from the property, or both.

* * *

APPENDIX I

49 U.S.C. § 14506 provides:

§14506. Identification of vehicles

(a) RESTRICTION ON REQUIREMENTS.—No State, political subdivision of a State, interstate agency, or other political agency of two or more States may enact or enforce any law, rule, regulation standard, or other provision having the force and effect of law that requires a motor carrier, motor private carrier, freight forwarder, or leasing company to display any form of identification on or in a commercial motor vehicle (as defined in section 14504a), other than forms of identification required by the Secretary of Transportation under section 390.21 of title 49, Code of Federal Regulations.

(b) EXCEPTION.—Notwithstanding subsection (a), a State may continue to require display of credentials that are required—

(1) under the International Registration Plan under section 31704;

(2) under the International Fuel Tax Agreement under section 31705 or under an applicable State law if, on October 1, 2006, the State has a form of highway use taxation not subject to collection through the International Fuel Tax Agreement;

(3) under a State law regarding motor vehicle license plates or other displays that the Secretary determines are appropriate;

(4) in connection with Federal requirements for hazardous materials transportation under section 5103; or

(5) in connection with the Federal vehicle inspection standards under section 31136.

OPPOSITION BRIEF

No. 11-798

In The
Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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RESTATEMENT OF QUESTIONS PRESENTED

49 U.S.C. § 14501(c) ("section 14501(c)"), a provision of the Federal Aviation Administration Authorization Act of 1994 (a trucking deregulation statute), provides in relevant part as follows:

> (c) Motor carriers of property. –
>
> (1) General rule. – Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . .
>
> (2) Matters not covered. – Paragraph (1) –
>
> (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles . . . .

The questions presented are:

1. Whether certain provisions of a motor-carrier-related contract utilized by the Port of Los Angeles – a commercial enterprise operated by a municipal governmental entity – designed to permit the Port to expand its business and to achieve other commercial objectives, fall within the market participant exception to preemption and hence are not preempted by section 14501(c).

2. Whether (a) a contractual requirement by the Port of Los Angeles, providing that motor carriers

RESTATEMENT OF QUESTIONS PRESENTED – Continued

must demonstrate their financial capability in order to access state-owned property on which the Port is located, or (b) the Port's requirement that motor carriers enter into a contractual relationship with the Port in order to gain access to the Port, relates to the prices, routes, or services of such carriers in a manner prohibited by section 14501(c).

3. Whether *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954), precludes a contractual requirement by the Port of Los Angeles that motor carriers seeking to access state-owned property on which the Port is located agree to maintain their trucks pursuant to manufacturers' specifications.

PARTIES TO THE PROCEEDING

Petitioner is the American Trucking Associations, Inc., plaintiff-appellant below.

Respondents are the City of Los Angeles, the Harbor Department of the City of Los Angeles, and the Board of Harbor Commissioners of the City of Los Angeles, all defendants-appellees below, and the Natural Resources Defense Council, the Sierra Club, and the Coalition for Clean Air, Inc., all defendants-intervenors-appellees below.

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INTRODUCTORY STATEMENT

The petition for certiorari filed by the American Trucking Associations, Inc. ("ATA") fails to describe adequately either the facts surrounding the concession contract developed by the Port of Los Angeles ("POLA" or "the Port") or the governing law. The petition in fact goes so far as to rely on authority that ATA characterized as inapplicable before the Court of Appeals. As we will explain, (a) the concession contract was created for business purposes by POLA and hence is within the market participant exception to preemption, and (b) none of the three contentions asserted by ATA as a basis for review by this Court is well-founded. The challenged portions of the Court of Appeals' decision merely reflect application of established law to the particular facts of this case.

RESTATEMENT OF THE CASE

I. THE PORT OF LOS ANGELES

This case arises out of actions taken by POLA to enable expansion of its terminals and facilities in order to capture additional business and to maintain its position as the leading container port in the United States. Absent from ATA's petition is any real discussion of the District Court's factual findings regarding these circumstances, which ATA did not challenge and which form the factual basis for the Court of Appeals' ruling.

POLA is a major commercial entity owned and operated by the City of Los Angeles. Petitioner's

Appendix ("App.") 5a-6a, 68a-70a. It is entirely self-sustaining and does not depend on taxpayer support, handling its finances independently of the City. *Id.* at 5a, 70a.

POLA operates as a landlord port, leasing terminal facilities to marine terminal operators ("MTOs"). *Id.* at 5a-6a, 71a. Trucks serving the Port (known as "drayage" trucks) transport goods to and from MTOs, depending on whether the cargo is outbound or inbound. *Id.* at 6a, 71a. Accordingly, "[a] supply of drayage trucks and drivers is integral to cargo movement at the Port." *Id.* at 6a, 28a (quoting District Court's findings of fact).

POLA earns its revenues by charging fees for services and infrastructure provided to MTOs, and such revenues are directly tied to the volume of cargo moved through the terminals. *Id.* at 72a, 120a. It is in the Port's business interest, therefore, to increase cargo traffic through its terminals. *Id.* at 27a-28a, 72a, 120a-21a.

POLA currently competes for business against other United States ports and ports in Mexico and Canada. *Id.* at 6a, 73a. To capture additional business through expanded cargo capacity, the Port has sought to upgrade and expand its existing terminals and facilities. *Id.*

II. THE CONCESSION CONTRACT PROGRAM

The Port is located in California's South Coast Air Basin, which has been designated by the United

States Environmental Protection Agency as a high-pollution area, and operations at the Port are a major contributor to that designation. *Id.* at 73a-74a. Drayage trucks, which tend to be older and more highly polluting than those used by long-haul truck fleets, historically have accounted for a large percentage of air pollutants from Port sources. *Id.* at 75a.

As a result of the emissions caused by Port operations, environmental and community groups have mobilized to oppose Port expansion, blocking a series of expansion projects at the Port from approximately 2001-2008. *Id.* The first such project was

> stymied by legal opposition from community and environmental groups, which [initiated litigation] claim[ing] that the Port's expansion would increase air pollution [and] that such pollution would adversely [a]ffect the health of people in the surrounding communities . . . .

Id. at 8a; *see also id.* at 76a-77a. The lawsuit led to an injunction delaying construction of a proposed new terminal and to an eventual settlement costing the Port more than $80 million. *Id.* at 7a, 76a-77a. Similar opposition delayed another proposed expansion, and a threatened lawsuit was averted only by another costly settlement. *Id.* at 7a, 77a-78a.

In response to the environmental litigation that had thwarted the Port's expansion plans, POLA (jointly with the adjacent Port of Long Beach ("POLB")) adopted a Clean Air Action Plan ("CAAP")

in 2006.[1] *Id.* at 7a. As the Court of Appeals' decision describes it:

> In the CAAP, the Port announced its intention to . . . achieve a 45% reduction in total emissions by 2012. The Ports stated that they "recognize that their ability to accommodate the projected growth in trade will depend upon their ability to address adverse environmental impacts . . . ."

Id. at 7a-8a.

As part of the CAAP, the Port introduced a Clean Truck Program ("CTP"). The CTP was "designed to reduce emissions from the heavy-duty trucks involved in port drayage . . . ." *Id.* at 8a. The CTP included a requirement that drayage trucks serving the Port operate under a concession contract with the Port. *Id.* at 10a. That contract, which sets forth a series of requirements for drayage trucks serving the Port, is the subject of this litigation.

POLA made substantial monetary investments as part of the CTP. Specifically, it spent almost $60 million for the purpose of securing cleaner drayage trucks for use at the Port:

- POLA paid approximately $56.5 million in incentive payments and grants to put

---

[1] Though it was originally a defendant in this case, POLB settled with ATA in October 2009. *See* App. 7a n.5.

3500 new clean trucks into service at the Port.

- It participated in a truck "preorder" program with POLB under which the two Ports contracted with truck manufacturers to ensure the availability of clean trucks for motor carriers.
- It invested more than $1 million in developing an electric truck for use in port drayage and itself purchased 25 electric drayage trucks.

Id. at 90a-92a.

III. PROCEEDINGS BELOW

A. Background

ATA initiated this litigation in 2008, principally challenging the concession contract as being preempted by 49 U.S.C. § 14501(c) ("section 14501(c)"), part of the Federal Aviation Administration Authorization Act of 1994 (the "FAAAA"), a trucking deregulation statute. The relevant part of section 14501(c) is set out in the Restatement of Questions Presented. ATA also challenged, under *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954), the Port's ability to use a concession contract to limit motor carrier access to its property.

Although ATA initially directed its preemption challenge to the concession contract as a whole, it ultimately narrowed its challenge to (a) the Port's requirement that motor carriers enter into a

concession contract (the concession contract "mechanism"), and (b) five contract provisions:

> 1. An off-street parking provision, requiring concessionaires to submit to the Port for approval an off-street parking plan for their trucks and to comply with parking and route laws;
>
> 2. A placard provision, requiring carriers to post placards while on Port property, referring members of the public to a telephone number to report safety or emissions concerns;
>
> 3. A financial capability provision, requiring concessionaires to demonstrate that they possess the financial capability to perform their obligations under the contract;
>
> 4. A maintenance provision, requiring concessionaires to ensure that truck maintenance is conducted in accordance with manufacturers' instructions; and
>
> 5. An employee-driver provision, requiring concessionaires to transition over five years to using employee drivers rather than independent contractor drivers.

App. 12a-13a.

B. Proceedings in the District Court

Prior to trial, there were two District Court proceedings, both of which were appealed to the Ninth Circuit, involving preliminary injunction

issues. *See id.* at 138a-272a. Following a six-day bench trial, the District Court eventually issued an opinion holding that the concession contract was not preempted. *Id.* at 59a-137a.

C. The Court of Appeals' Decision

The Court of Appeals affirmed the District Court's decision in large measure, though it reversed with respect to the employee-driver provision.[2] The court relied on the District Court's findings of fact concerning the commercial motivation underlying the CTP and its concession contract component, and it determined that two provisions of the concession contract – the off-street parking and placard provisions – were not preempted because the Port acted as a market participant in adopting those provisions. *Id.* at 33a, 38a-41a, 44a-46a. In this connection (and more broadly) the court concluded that, in adopting the concession contract mechanism and the pertinent contract requirements, the Port acted as a private port owner would have acted under the circumstances:

---

[2] Judge N. Randy Smith dissented from the majority opinion, expressing the view that the Port acted as a regulator, rather than a market participant, with respect to the concession contract. *Id.* at 48a-52a. Judge Smith further expressed the opinion that the concession contract serves to preclude motor carriers from participating in the transport of interstate goods, as prohibited in his view by *Castle*. *Id.* at 52a-56a.

> The Port has a financial interest in ensuring that drayage services are provided in a manner that is safe, reliable, and consistent with the Port's overall goals for facilities management. A private port owner could (and probably would) enter into concession-type agreements with licensed motor carriers in order to further its goals.

Id. at 29a. The decision also specifically determined that

> [e]nhancing good-will in the community surrounding the Port is an important and, indeed, objectively reasonable business interest, particularly since the community has already proved its ability to stym[ie] Port growth and operations by pursuing litigation over health hazards and environmental impacts.

Id. at 40a. It additionally concluded that "[t]he off-street parking provision . . . serves the Port's business interest in promoting Port security." *Id.* However, the court determined that the employee-driver provision was "tantamount to regulation," *id.* at 44a, and hence was preempted, because it sought to "impact third party behavior unrelated to the performance of the concessionaire's obligations to the Port." *Id.* at 43a.[3]

---

[3] Because the Port does not seek review of the Court of Appeals' ruling that the employee-driver provision is preempted, that provision is not at issue here.

The Court of Appeals also concluded that the financial capability provision was not preempted because it does not relate to prices, routes, or services in more than a "tenuous" fashion. *Id.* at 34a (quoting *Rowe v. New Hampshire Transp. Ass'n,* 552 U.S. 364, 371 (2008)). Nor, it ruled (for similar reasons), was POLA's general requirement that carriers seeking access to the Port enter into a concession contract preempted. *Id.* at 16a-21a.

Additionally, the court held that the maintenance provision "is intended to be and is genuinely responsive to safety, [and] so is not preempted [by virtue of section 14501(c)(2)(A)]." *Id.* at 33a. Finally, the Court of Appeals found that *Castle* does not bar the Port from permitting access only to motor carriers that comply with the safety restrictions set forth in the concession contract. *Id.* at 30a-32a.

REASONS FOR DENYING CERTIORARI

I. THE COURT OF APPEALS' DECISION APPLYING THE MARKET PARTICIPANT DOCTRINE TO THE PARTICULAR FACTS OF THIS CASE DOES NOT MERIT REVIEW

A. ATA's Petition Fails to Adequately Analyze the Market Participant Doctrine

ATA's discussion of the market participant doctrine is flawed in that it lacks any grounding in the origin of and essential basis for the doctrine. The first

case in which this Court identified and applied an exception to preemption principles for proprietary conduct by a state was *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). *Hughes* involved a Maryland plan for ridding the state of abandoned automobiles. Under the plan, licensed scrap processors who came into possession of old, inoperative vehicles ("hulks") could claim a monetary "bounty" from the state. Because certain of the plan's requirements were more onerous for out-of-state scrap processors, a Virginia plaintiff claimed that the program violated the negative or dormant Commerce Clause. The Court rejected the challenge on the ground that the Maryland plan did not involve "regulation":

> Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price.

Id. at 806. And the Court continued:

> Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.

Id. at 810.

Four years later, in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), the doctrine was applied for a second time to sustain, against Commerce Clause attack, a policy of a cement plant owned by South Dakota that discriminated between in-state and out-of-state cement

purchasers. The Court found that the state was a market participant and that "there is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Id.* at 437.

Although both *Hughes* and *Reeves* found the existence of a market participant exception to preemption in the context of the negative Commerce Clause, the Court has applied the principles of those decisions to create exceptions to statutory preemption as well. *See, e.g., Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 232-33 (1993) (the "*Boston Harbor*" decision) (state activities shielded from National Labor Relations Act ("NLRA") preemption under market participant doctrine).[4]

---

[4] *Cf. Wisconsin Dep't of Indus. v. Gould*, 475 U.S. 282, 288-89 (1986) (state conduct preempted by NLRA because such conduct sought to regulate labor relations policy); *Chamber of Commerce v. Brown*, 554 U.S. 60, 70-71 (2008) (same). In light of *Boston Harbor*, any suggestion that the Court of Appeals here improperly applied law relevant only to the Commerce Clause, and not to federal statutes, is incorrect. *See, e.g.*, *Amicus* Br. for the Chamber of Commerce of the United States and the National Industrial Transportation League ("Chamber *Amicus* Br.") 13-14, 17. Any attempt to distinguish *Boston Harbor* on the ground that it concerned the NLRA, which does not contain an express preemption clause, also is meritless. *See* Pet. 31; Chamber *Amicus* Br. 14. As we will show, Courts of Appeals have applied the doctrine to save state action from preemption under the FAAAA's express preemption clause. Moreover, the doctrine has been applied to exempt state action from preemption by the Employee Retirement Income Security Act, which likewise

(Continued on following page)

Thus, the essence of the market participant doctrine concerns whether a state entity is acting in a proprietary fashion as an owner of property or is engaged in regulation. As this Court stated the point in *Boston Harbor*:

> When a State owns and manages property . . . it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption . . . because pre-emption doctrines apply only to state *regulation*.

507 U.S. at 227 (emphasis in original). The decision below relied precisely on that distinction.

It bears emphasis that the market participant doctrine creates exceptions to preemption where there is no statutory language providing for such an exception. In *Boston Harbor*, for example, the doctrine was found to be applicable even though the NLRA contains no textual basis for its application. Hence ATA's multiple references to the fact that the decision below applies the doctrine although the FAAAA contains no textual exception, *see, e.g.*, Pet. 11, 12, lack substance.[5]

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contains an express preemption clause. *See, e.g., Associated Gen. Contractors v. Metro. Water Dist.*, 159 F.3d 1178, 1182-83 (9th Cir. 1998).

[5] ATA's petition seeks to rely on an *amicus* brief filed in the Court of Appeals by the United States in 2008. Pet. 18-19. That brief, however, was filed in the initial, preliminary injunction

(Continued on following page)

The *amicus* brief filed by the Chamber of Commerce of the United States and the National Industrial Transportation League spends several pages in this connection seeking to show that POLA's concession contracts have (in the language of section 14501(c)) "the force and effect of law." Chamber *Amicus* Br. 3-4, 7-12. That issue is beside the point, however.

Even if a measure enacted by a state entity has such force and effect, that does not mean that the measure is regulatory or that the market participant doctrine otherwise does not apply. It means merely that the measure falls within the language of section 14501(c). Whether the market participant doctrine is applicable is a separate question. *See, e.g., Hughes*, 426 U.S. at 796 ("comprehensive [state] statute" held to fall within market participant doctrine); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1045-47 (9th Cir. 2007) (state agency rules dictating government purchases held to be within market participant doctrine although they were emission control "standards" within Clean Air Act's express preemption provision); *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 689

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phase of the case, before discovery or trial, and it failed to address much of the majority's reasoning below. It was only at trial that the District Court became persuaded of the market participant doctrine's applicability here, *cf.* App. 252a-53a, based on detailed factual findings that the Government's 2008 brief could not possibly have taken into account.

(5th Cir. 1999) (city "ordinance" held covered by doctrine).[6] *Engine Manufacturers* held in fact that although the rules in question were enforceable by "criminal sanctions and fines," 498 F.3d at 1048, they nonetheless were within the market participant doctrine. Thus, although the Chamber *amicus* brief emphasizes that the concession contracts are reflected in the Port's tariff and in a city ordinance "backed by the threat of criminal prosecution," Chamber *Amicus* Br. 9, that fact is similarly irrelevant.

ATA goes so far as to state that in the context of "FAAAA preemption[, . . . n]o [market participant] exception exists *at all* . . . ." Pet. 12 (emphasis in original). That statement is flatly incorrect. Even ATA elsewhere recognizes that to be so, inasmuch as its petition states a few pages later that some circuits "have recognized [a] market-participant exception to the FAAAA." Pet. 15.[7]

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[6] To be sure, there is language in *Cardinal*, 180 F.3d at 695 (quoted in *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1050 (9th Cir. 2000), *cert. denied*, 531 U.S. 1146 (2001)), suggesting that proprietary action by a state generally is "without the force of law," and the Court of Appeals here also so indicates, *see* App. 16a. But such language clearly does not mean that *only* state actions lacking the "force and effect of law" are within the market participant exception to the FAAAA – as *Cardinal*'s conclusion that a city ordinance fell within the doctrine (as well as the other decisions cited above) demonstrates.

[7] ATA asserts that "[o]nly once has this Court applied a market-participant exception to conclude that a state action was not preempted – and it did so in a case involving . . . implied preemption under the National Labor Relations Act." Pet. 17

(Continued on following page)

The *amicus* brief submitted by Airlines for America ("A4A *Amicus* Br.") bases its contention that there is no market participant exception to the FAAAA principally on the fact that the Airline Deregulation Act ("ADA"), on which the FAAAA was to some extent patterned, contains a specific exception for the proprietary actions of municipally owned airports, while the FAAAA contains no comparable "proprietary action" exception. A4A *Amicus* Br. 12. As we have noted, however, several Courts of Appeals have held that there does exist a market participant exception to FAAAA preemption, and no court has held to the contrary. To the extent that the A4A *amicus* brief also bases its argument on the fact that section 14501(c) contains certain explicit exceptions but no express market participant exception, its argument likewise is inconsistent with all of the FAAAA-related decisions cited above. Finally, A4A's reliance in this regard on decisions such as *Russello v. United States*, 464 U.S. 16 (1983), *see* A4A *Amicus* Br. 13, ignores the fact that such decisions relate to interpreting

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(citing *Boston Harbor*, 507 U.S. at 232). This statement is baffling given the actual case law. As we have explained, the first two cases in which the doctrine was considered, for example – *Hughes* and *Reeves* – "applied [the] market participant exception to conclude that a state action was not preempted . . . ." Furthermore, ATA's observation that prior FAAAA market participant decisions happen to have involved municipal towing, Pet. 15, is simply irrelevant. No such decision in any way suggests that towing presents the sole set of circumstances in which the market participant doctrine may be applied to the FAAAA.

different provisions of the same statute, not provisions of different statutes (even statutes that are related, such as the ADA and the FAAAA).

B. None of the Supposed "Conflicts" Discussed with Respect to the Market Participant Doctrine in ATA's Petition is in Fact a Conflict

1. The Decision Below Does Not Conflict with the Fifth Circuit's *Smith* Decision

First, ATA claims that the decision below conflicts with *Smith v. Department of Agriculture*, 630 F.2d 1081 (5th Cir. 1980), *cert. denied*, 452 U.S. 910 (1981). But the key factors relied on by the Court of Appeals here with respect to the market participant doctrine distinguish this case from the Fifth Circuit's two-to-one decision in *Smith*.

In *Smith*, a farmers' market operated by Georgia on state-owned land discriminated against out-of-state farmers. The Fifth Circuit majority concluded that the market's treatment of sellers was regulatory in nature and so was outside the scope of the market participant doctrine. 630 F.2d at 1083.

But the Ninth Circuit in this case emphasized points that significantly distinguish *Smith*. For example, its opinion recognizes that POLA is a commercial enterprise – a "business entity, operating wholly separately from the city government," which is "entirely self-sustaining . . . ." App. 27a. The Port

competes in what the Court of Appeals referred to as a "port[s] market," App. 25a-26a, and seeks to operate so as to "maintain its competitive position with respect to other ports and capture additional business . . . ." App. 28a (quoting District Court's findings of fact). POLA's concession contract grew directly out of that competitive interest, given the environmental and community opposition that had impeded the Port's expansion for several years.[8] There is no indication in *Smith* that the farmers' market in question was a self-sustaining or even a substantial business entity,[9] that it was in competition with other farmers' markets, or that it sought to maintain its competitive position in any market at all.

Furthermore, the decision below concluded that because of POLA's interest "in ensuring that drayage services are provided in a manner that is safe, reliable, and consistent" with the Port's business goals for facilities management, a privately owned port likely would have insisted on a concession contract of the type the Port actually approved. App. 29a. There is no reason, by contrast, why a privately owned farmers' market would discriminate against farmers

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[8] The assertion in the Chamber *amicus* brief, at 11-12, 17, that the purpose of the concession contract requirement is "environmental" thus misses the point. The requirement has environmental goals (among others) because the Port reasonably perceives such goals as being in its *business interest*.

[9] In fact, the farmers' market operated at a loss. The State of Georgia had to fund almost half of the market's operating expenses from its general revenues. *See* 630 F.2d at 1082 n.1.

from states other than the one in which the market is located. In fact, no business interest at all was served by Georgia's discrimination against out-of-state farmers in *Smith*.

To equate, for market participant purposes, a multi-billion dollar enterprise that is the largest port in the United States – and that took actions a privately owned port also would have taken for business and competitive reasons – with a farmers' market that was not a profit-making entity and that acted quite differently from the way a privately owned market would have acted thus is not plausible. Indeed, although ATA tellingly failed even to cite *Smith* in its briefs to the merits panel below, the Court of Appeals did analyze that decision in a footnote, along with certain similar cases, concluding that those cases "are distinguishable . . . ." App. 28a-29a n.13. As the court saw it, such decisions merely "illustrate that other courts examine whether a particular provision is actually related to the State's proprietary interest" or whether "it reflects the State's regulatory interest . . . ." *Id.* That is exactly the principle for which *Smith* stands – *i.e.*, that the actions of a state entity that is a "market regulator" fall outside the market participant doctrine. Far from rejecting *Smith*'s reliance on that distinction, the decision below is fully consistent with that principle.

This conclusion is underscored by the Court of Appeals' treatment of the Port's employee driver requirement, which is almost entirely ignored by ATA and the *amici* supporting it. That aspect of POLA's

concession contract, the majority concluded, was outside the scope of the market participant doctrine because it was really "tantamount to regulation" of the types of drivers drayage trucks may utilize. *Id.* at 44a (quoting *Gould*, 475 U.S. at 289). Thus, the majority applied a nuanced, provision-by-provision analysis of the concession contract in a fashion wholly congruent with *Smith*, and any suggestion that the decision below renders the market participant doctrine without "boundaries" or "rational limits," *see* Chamber *Amicus* Br. 6, 16, is simply incorrect.

Accordingly, there is no conflict between the decision below and *Smith*. At most, there is a fact-specific issue as to whether POLA's operations – and in particular, specific provisions of its concession contract – fall on one side or the other of the dividing line that both *Smith* and the decision below recognize as determinative. This sort of fact-based issue is not the sort that justifies review by this Court. *See Wisconsin Elec. Co. v. Dumore Co.*, 282 U.S. 813 (1931).

2. The Decision Below Does Not Conflict with this Court's *Wunnicke* Decision

ATA also claims that the decision below conflicts with this Court's decision in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). But the court below was correct in concluding that *Wunnicke* is "not controlling" with respect to whether, as ATA contends, the market participant doctrine is

applicable only when a state agency's actions are confined to a "'narrow' market defined by contractual privity." App. 26a n.12. ATA suggested to the Ninth Circuit that the "narrow" market here is a "ports" market and does not extend to a supposed "drayage trucking" market. *See id.* at 25a-26a.

First, as both the District Court and the Court of Appeals noted, *see id.* at 118a-19a n.11 and 26a n.12, the market participant aspect of *Wunnicke* is not a holding by this Court but reflects only the views of a plurality of four of the eight participating Justices. Those four Justices viewed an Alaska statutory policy as to the processing of timber harvested from state-owned lands as being outside the market participant doctrine because it imposed restrictions "down-stream" from the market for the sale of raw timber. 467 U.S. at 99. The other four participating Justices did not join in the plurality's analysis of the market participant doctrine, though two Justices concurred in the result on unrelated and narrower grounds. Hence the plurality's view does not constitute the holding of the Court and is not binding law. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

ATA notes that various other decisions refer to the plurality opinion in *Wunnicke* and implies that even if that opinion does not reflect a holding by this Court, it is the law of circuits whose decisions have referred to that opinion. Pet. 14 & n.5. But lower courts routinely refer in the course of their decisions to plurality or even dissenting opinions authored by Justices of this Court. Such references do not, of

course, transform (for instance) a dissent from a decision of this Court into the law of the lower court in question. As the court below stated, moreover:

> Subsequent cases either distinguish *Wunnicke* as an outlier involving special considerations of natural resources, foreign commerce, and restrictions on resale, or cite *Wunnicke* for general positions of law not unique to its analysis.

App. 26a n.12 (citations omitted). And at least the great majority of such cases carefully note that the pertinent part of *Wunnicke* is merely a "plurality" opinion.[10]

It is noteworthy, in addition, that for all of ATA's discussion concerning what is the "relevant market" here, its petition provides no real analysis of relevant market principles as those principles are applied in, for instance, antitrust law. *See, e.g.*, ABA Section of Antitrust Law, Antitrust Law Developments 549-622 (6th ed. 2007). No holding of this Court dictates, moreover, that any such analysis must be undertaken in a market participant case. In *Reeves*, for example –

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[10] *See, e.g., Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 348 n.17 (2008), in which a three-Justice plurality merely denied the dissent's suggestion that its reasoning conflicted with what it explicitly referred to as "the *plurality's* conclusion" in *Wunnicke* (emphasis added). *See also Big Country Foods, Inc. v. Bd. of Educ.*, 952 F.2d 1173, 1177 (9th Cir. 1992) (citing *Wunnicke* as a "plurality opinion"); *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1056 (9th Cir. 1987) (referring to *Wunnicke*'s "4-2-2 decision").

and in other decisions by this Court – the Court merely assessed whether the state entity in question participated in "the free market," 447 U.S. at 437, underscoring the fact that the fundamental issue underlying application of the market participant doctrine is whether a state is acting in a business capacity (in whatever market) or in a regulatory fashion.[11]

3. The Decision Below Does Not Conflict with Market Participant Decisions by Other Courts of Appeals Analyzing the Existence of "Procurement" by the State Entity in Question

ATA next purports to find a conflict between the decision below and the following language, which appears in some Court of Appeals decisions (including

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[11] One Court of Appeals decision has engaged in a truncated market definition analysis, sustaining application of the market participant doctrine in circumstances analogous to those presented here. *See Four T's, Inc. v. Little Rock Mun. Airport Comm'n*, 108 F.3d 909, 913 (8th Cir. 1997) (airport leasing counter space to rental car companies participated in car rental market). *See also Transp. Limousine of Long Island, Inc. v. Port Auth. of N.Y. and N.J.*, 571 F. Supp. 576, 581 (E.D.N.Y. 1983) (airports leasing space to limousine companies participated in market for provision of limousine services); *cf. Florida Transp. Serv., Inc. v. Miami-Dade Cnty.*, 757 F. Supp. 2d 1260, 1282 (S.D. Fla. 2010) (port did not participate in stevedoring market although it utilized stevedores). The fact-bound issue of defining a relevant market in a given case such as this one is in any event not one meriting certiorari.

those of the Ninth Circuit) and which sets out two questions relevant to whether the market participant doctrine is applicable:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary program?

Cardinal Towing, 180 F.3d at 693. *See also Engine Mfrs.*, 498 F.3d at 1041 (9th Cir. 2007) (same). The Court of Appeals here held that the second part of this framework is inapplicable, so that the sole issue in this case concerns the "procurement" portion. App. 21a-23a.

ATA argues in this respect that POLA's concession contract provisions do not fall within the market participant doctrine because the Port does not itself directly purchase – *i.e.*, "procure" – drayage services. *See* Pet. 18-19. This contention fails for multiple reasons.[12]

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[12] It is noteworthy that ATA's semantic "procurement" argument is not even supported by several of the cases it cites. *See, e.g., Cardinal Towing*, 180 F.3d at 693 (referring to "efficient performance" as well as efficient "procurement"); *Council of City of N.Y. v. Bloomberg*, 6 N.Y. 3d 380, 395 (N.Y. 2006) (referring to "efficient performance of contracts").

First, as the court below noted, Maryland did not "procure" any junked cars in *Hughes*, yet this Court held the market participant doctrine to be applicable in that case. App. 24a.[13] Even more clearly, the same is true in *Reeves*, where the issue had nothing to do with "procurement" at all but instead addressed discrimination in the sales made by South Dakota's cement plant.

Second, the Court of Appeals fully considered and rejected ATA's mechanistic argument, which is based after all only on certain decisional language relating to procurement. The court first noted (quoting and following *Reeves*) that "[i]n applying the market participant doctrine, we undertake a single inquiry: whether the challenged program constitute[s] direct [S]tate participation in the market." App. 21a (citation and internal quotations omitted). The opinion then went on to mesh that point with the "efficient procurement" language of *Cardinal Towing*:

> The first prong of *Cardinal Towing* is useful in cases where the government is buying goods or seeking services, but it is not the be-all-and-end-all of proprietary action. *Cardinal Towing* acknowledged as much, noting

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[13] Although the Court in *Hughes* did observe that Maryland was "a purchaser, *in effect*," 426 U.S. at 808 (emphasis added), of hulks, that very phrase indicates that the state was not truly a purchaser. And the decision is clear that Maryland had none of the attributes of a purchaser of hulks – it did not, for instance, use them in any way or even own or possess them.

> that its questions "seek to isolate" those cases to which the market participant doctrine applies and help courts to "distinguish[ ] between proprietary action that is immune from preemption and impermissible attempts to regulate through the spending power." 180 F.3d at 693. If the State is not engaged in "efficient procurement" but nonetheless directly participates in the market in a proprietary manner, we see no reason why *Cardinal Towing* should preclude the application of the market participant doctrine .... "[A] 'single inquiry' [should be used] to determine 'whether the challenged program constitute[s] direct state participation in the market ....'"

App. 25a (citation omitted). Far from rejecting the "efficient procurement" language of *Cardinal Towing*, therefore, the majority here incorporated it into a broad, eminently sensible, and already existing analysis fully consistent with *Hughes*, *Reeves*, and all other decisions regarding the market participant doctrine.

In any event, although the decision below stated in dictum that POLA does not engage in the procurement of drayage services, App. 28a, uncontested evidence in the record suggests otherwise.[14] Specifically,

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[14] In addition, despite the dictum referred to above, the Court of Appeals concluded that:

> The Port necessarily requires the interrelated service of drayage trucking in order to transport . . . goods to

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POLA has spent almost $60 million for the purpose of securing new, cleaner trucks for use at the Port. *See* pp. 4-5, *supra*.

II. THE ISSUE OF WHETHER THE CONCESSION CONTRACT REQUIREMENT GENERALLY OR THE CONTRACT'S FINANCIAL CAPABILITY PROVISION RELATES TO MOTOR CARRIERS' PRICES, ROUTES, OR SERVICES DOES NOT WARRANT CERTIORARI

As noted above, among the five concession contract provisions at issue, the Court of Appeals applied the FAAAA's preemption language only to the concession contract's financial capability provision, holding that that provision does not relate to motor carriers' prices, routes, or services "in a more than tenuous fashion," App. 33a, and hence is not preempted.[15] The court's holding to that effect does not justify review by this Court, nor does its conclusion that the Port's concession contract requirement itself is not preempted.

> customers or points of forwarding. The district court found that . . . a supply of drayage trucks and drivers is integral to cargo movement at the Port . . . . [Drayage] services are an integral part of Port business.

App. 27a-28a.

[15] As ATA concedes, the dissent evidently agreed with the majority regarding the financial capability provision. *See* Pet. 9 n.4.

A. Preemption Decisions Involving ERISA Do Not Support ATA's Petition

The petition relies heavily on preemption decisions dealing with the Employee Retirement Income Security Act ("ERISA"). This is (to say the least) surprising, because ATA specifically argued to the Ninth Circuit that ERISA preemption decisions have little if any relevance:

> [C]ases involving . . . ERISA do not control this case . . . . ERISA ties preemption to the scope of that particular statutory scheme, not . . . prices, routes, or services.

ATA Reply Brief 5, No. 10-56465 (9th Cir. Feb. 15, 2011), ECF No. 40. ATA's about-face by itself casts serious doubt on its ERISA-based arguments, but we will briefly explain why ATA's current contentions are wrong.

Statutory preemption analyses are based on the language of the statute in question and on the Congressional intent underlying that statute. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-38 (1990). Inasmuch as the specific prices, routes, or services language in the FAAAA was drawn by Congress from the ADA, *see DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 85-86 & n.4 (1st Cir. 2011), *cert. denied,* 132 S. Ct. 761 (2011), preemption decisions concerning that language under one of those statutes are relevant to preemption analysis under the other. ERISA, however, is (as ATA noted below) quite a different statute,

containing pertinent language different from that in the ADA or the FAAAA.

ERISA is a comprehensive act designed to "regulate[ ]" employee welfare and pension plans, including those that provide medical benefits for plan participants. *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 650-51 (1995). That is, it affirmatively sets up a regulatory regime within which pension and benefit plans must operate. The relevant part of the FAAAA, on the other hand (like the cognate portion of the ADA), is in essence simply a deregulation measure.

Moreover, as ATA also recognized below, the preemption language in ERISA differs significantly from the comparable terminology in the FAAAA. ERISA's chief preemption provision makes no reference to prices, routes, or services – the crux of ATA's current statutory preemption contentions. Instead, it provides that, with certain exceptions, its provisions "shall supersede any and all State laws insofar as they . . . *relate to any employee benefit plan*" of a type specified elsewhere in the statute. 29 U.S.C. § 1144(a), (b) (emphasis added). Thus, the statute preempts state laws that "relate to" a benefit plan, not to issues such as prices, routes, or services.

Accordingly, the ERISA preemption decisions cited in ATA's petition have no real relevance to the prices, routes, and services issue as to which ATA seeks review. In particular, ATA's contention that

preemption is called for where a state statute "singles out the subject of the federal scheme" – rather than being a statute of general applicability, Pet. 22 – fails because its source is ERISA preemption case law, not FAAAA or ADA case law.[16]

Rowe is this Court's most recent decision analyzing the FAAAA's prices, routes, or services language. There, a law enacted by the state of Maine required that deliveries of tobacco products be handled in certain ways – involving special conduct such as "recipient verification" by (for example) truck drivers making such deliveries. Applying *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), an ADA preemption case, the Court understandably concluded that the Maine statute had a "significant" impact on motor carriers' "services" and was therefore preempted. This was so because "the law . . . require[s] carriers to offer a system of services that the market does not now provide." 552 U.S. at 372. The Court was

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[16] The language quoted by ATA from *Goodspeed Airport LLC v. East Haddam Island Wetlands and Watercourses Commission*, 634 F.3d 206, 212 (2d Cir. 2011), *see* Pet. 22, does not suggest that "generally applicable" state laws cannot, regardless of their impact, escape ADA preemption, much less that "targeted" state laws are generally so preempted. The holding of the decision was simply that there was no preemption "on the facts before us . . . ." *Id.* ATA's reliance on *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1258-59 (11th Cir. 2003), *cert. denied*, 540 U.S. 1182 (2004), is similarly misplaced. The holding in *Branche* was that the state law claim in question was *not* preempted by the ADA. *Id.* at 1261.

careful to preserve the rule stated in *Morales* that the ADA (and hence the FAAAA) does not preempt state laws that affect prices, routes, or services of carriers in "too tenuous, remote, or peripheral a manner." *Id.* at 375 (quoting *Morales*, 504 U.S. at 390).

If ATA were correct that a state statute singling out the "subject of the federal scheme" is thereby preempted under the FAAAA, *Rowe*'s careful analysis, based on *Morales*, of the Maine legislation's impact on motor carriers' services would have been unnecessary, because the state statute at issue was not one of general applicability but instead effectively singled out motor carriers. *See* 552 U.S. at 375-76. Indeed, as the First Circuit has recognized, the ADA's preemption language "might have been read to target only state enactments focusing solely on airlines, but that reading has been twice rejected by the United States Supreme Court." *DiFiore*, 646 F.3d at 86 (citing *Morales*, 504 U.S. at 386, and *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 227-28 (1995)).

B. ADA and FAAAA Preemption Decisions Do Not Support ATA's Petition

ATA fares no better with respect to its brief discussion of FAAAA/ADA precedent. The petition notes the existence of a pre-*Rowe* split among circuits as to the breadth of the statutory term "services." Pet. 24-25. However, that split – which evidently did not relate to prices or routes – was (as the petition notes) "superseded" by *Rowe, see DiFiore,* 646 F.3d at 88,

and is no longer a potential subject for review by this Court. And contrary to ATA's suggestion, *see* Pet. 25-26, the Court of Appeals here did not reject any other Circuit's approach to the term "services" and clearly included *Rowe* in its analysis of that term. App. 18a.[17]

Finally, the decision below is firmly grounded on record-based facts that do not even implicate the pre-*Rowe* split as to the meaning of "services." The decision here by the Ninth Circuit did not turn on any particular definition of that term. Instead, the majority relied on the fact that "the motor carriers who testified indicated that the financial capability provision *would not change their operations*." App. 34a (emphasis added).

The factual findings of the District Court, on which the Court of Appeals relied, show in similar fashion that the concession contract "mechanism" – *i.e.*, POLA's requirement that motor carriers serving the Port enter into a concession contract – does not affect prices, routes, or services. In a finding not

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[17] Nor is there any problem in the Court of Appeals' statement that a state may condition entry onto its property as long as the conditions for entry do not "compel [a] carrier to change [prices], routes, or services . . . ." App. 21a. This is merely another way of phrasing the question of whether state law significantly affects carriers' prices, routes, or services. It is noteworthy, moreover, that in the same paragraph the court emphasized that the relevant issue is whether a given provision of a concession contract binds a carrier to a particular price, route, or service "directly *or indirectly* . . . ." *Id.* (emphasis added).

challenged by ATA, the District Court concluded as follows:

> Prices charged by motor carriers performing drayage at POLA have not risen as a result of the concession contract requirement. Motor carriers continue to provide drayage services at POLA despite the concession contract requirement, and they have not changed the services they provide to customers as a result of the concession contract requirement.

App. 93a (citation omitted). This finding more than supports the Court of Appeals' conclusion that the concession contract does "not necessarily affect [prices], routes, or services" and its provision-by-provision approach to that question. App. 21a (emphasis omitted).[18]

III. CERTIORARI IS NOT MERITED WITH RESPECT TO THIS COURT'S DECISION IN *CASTLE V. HAYES*

ATA finally argues that the decision below conflicts with this Court's decision in *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954). In *Castle*, Illinois punished freight carriers that violated state

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[18] The Court of Appeals invoked in this connection *Air Transport Ass'n of America v. City and County of San Francisco*, 266 F.3d 1064 (9th Cir. 2001), which held that application of a San Francisco anti-discrimination ordinance to airports did not affect airlines' rates, routes, or services under the ADA.

limits on the weight of trucks by temporarily suspending the carriers' right to use Illinois highways. 348 U.S. at 62. At the time, there existed a regime of comprehensive regulation of the motor carrier industry (regulation that terminated between the 1970's and the 1990's through multiple trucking deregulation statutes, including the FAAAA). Under the Motor Carrier Act of 1935 (operative at the time of *Castle*), the Interstate Commerce Commission ("ICC") had exclusive authority to grant, revoke, or suspend federally granted certificates of convenience and necessity to motor carriers operating in interstate commerce. In this context, the Court found that the exclusion of an interstate carrier from Illinois' highways was "the equivalent of a partial suspension of [the carrier's] federally granted certificate," because Illinois highways were used by motor carriers "to transport interstate goods to and from that State . . . ." 348 U.S. at 64.

A. The Court Below Correctly Held that Denial of Access to Port Property Pursuant to the Safety-Related Aspect of the Concession Contract Does Not Run Afoul of *Castle*

ATA's petition may be thought ambiguous as to whether its reliance on *Castle* relates only to safety issues or to other aspects of the concession contract as well. As its own language indicates, however, the petition should be read as contending that the Port's concession contract contravenes "the longstanding

statutory interpretation [based on *Castle*] regarding the limits on States' abilities to enforce *vehicle-safety* regulations." Pet. 28 (emphasis added). Furthermore, that is the contention ATA made before the Court of Appeals – not surprisingly, inasmuch as *Castle* itself related to a state's safety-related restrictions. Indeed, both the Ninth Circuit majority and the dissent so recognized. The majority's discussion of *Castle* appears in a section of the opinion headed, "Safety Exception," App. 30a, and it characterized the issue as "whether the district court identified the correct legal principles in applying the safety exception to [FAAAA] preemption." *Id.* The dissent also headed its discussion of *Castle* "Safety Exception," *id.* at 52a, and in the end concluded that "the Port cannot justify any of the challenged regulations on the basis of safety." *Id.* at 56a.

Thus, the first point to be made about the petition's *Castle* contention is that even if it were persuasive – which it is not – it would have ramifications only as to the concession contract's maintenance provision, which (as noted above) is the only provision held to fall within the safety exception. *See* p. 9, *supra*.

In any event, regardless of whether it is read to relate only to safety or more broadly, ATA's *Castle* argument fails. As the court below recognized:

> Unlike a ban on using all of a State's freeways, a limitation on access to a single Port

> does not prohibit motor carriers from participating in "transport [of] interstate goods to and from that State" or eliminate "connecting links to points in other states."

App. 32a (citing *Castle*, 348 U.S. at 64).

This conclusion is supported by this Court's decision in *Bradley v. Public Utilities Commission of Ohio*, 289 U.S. 92 (1933). In that case, the Public Utilities Commission of Ohio denied an interstate carrier a certificate to operate as a common carrier over State Route 20, extending from Cleveland to the Ohio-Michigan border, with Michigan as the final destination. *Id.* at 94. This Court pointed out the likely existence of alternative routes and held that the state commission's denial of the certificate did not exclude the applicant from operating in interstate commerce: "The order does not in terms exclude him from operating interstate. The denial of the certificate excludes him merely from Route 20." *Id.*[19] Similarly, a motor carrier's failure to enter into and maintain a concession contract "excludes [it] merely from" POLA. Carriers barred from accessing POLA may continue to access the adjacent POLB, not to mention other California ports and all other California locations.[20]

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[19] *Bradley* was decided under a negative Commerce Clause analysis similar, we submit, to the analysis applicable to today's deregulated trucking circumstances.

[20] To be sure, POLB has adopted a Motor Carrier Registration and Agreement governing access of drayage trucks to its

(Continued on following page)

If exclusion of a motor carrier from a highway does not affect the ability of the carrier to participate in interstate commerce, then, *a fortiori*, exclusion of a motor carrier from state-owned property used for state business purposes does not preclude that carrier from operating interstate. Restrictions on access to state-owned property present special circumstances not specifically addressed by *Castle*. In fact, no decision of which we are aware addresses such a factual situation. By analogy, however, suppose that after the 1995 bombing of the federal building in Oklahoma City, cautious state authorities had set up a permanent perimeter around the state capitol (*i.e.*, around state-owned property) beyond which trucks could not pass but at which they would have to unload their cargo. Under ATA's position, *Castle* should be read to prohibit a state from doing this – *i.e.*, from regulating or restricting truck deliveries on the state's own property. As the court below correctly recognized, *Castle* does not go this far. *See* App. 31a.

B. *Castle* Is No Longer Governing Law

Although the court below expressed no opinion on this point, *see* App. 32a, *Castle* today is not good law with respect to the concession contract (as the District Court held, *see* App. 128a-29a, 156a-57a). Since

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facilities. However, ATA has specifically agreed to the registration agreement. *See* Stipulation of Settlement and Joint Motion for Voluntary Dismissal with Prejudice Between Plaintiff ATA and Long Beach Defendants 1-2 & Ex. A, No. 08-04920 (C.D. Cal. Oct. 19, 2009), ECF No. 203.

the passage of the ICC Termination Act in 1995, not a single federal court – apart from the courts below in this case – has analyzed the applicability of *Castle* on any set of facts, thus suggesting that the decision is of little if any import today.[21] Moreover, this Court has held that the safety exception from FAAAA preemption allows states to take motor carrier-related actions that are genuinely responsive to safety concerns, without once addressing whether *Castle* relates in any way to that issue. *City of Columbus v. Ours Garage*, 536 U.S. 424, 439, 442 (2002). Indeed, even prior to enactment of the FAAAA and trucking deregulation generally, this Court referred to the analysis underlying *Castle* as having been "significantly qualified." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

As we have noted, *Castle* was decided in the context of the Motor Carrier Act of 1935, which established a regime of extensive federal regulation of interstate trucking that has been dismantled in favor of a deregulated industry. In fact, one of the *amici* supporting ATA concedes that the federal trucking regime at the time of *Castle* is a "*now-defunct* body of federal regulation." Chamber *Amicus* Br. 5 (emphasis added). The federal licensing requirements that currently exist in today's deregulated trucking context, *see* Pet. 32-33, are relatively perfunctory in the

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[21] One state supreme court decision, *Bronco Wine Co. v. Jolly*, 33 Cal. 4th 943, 995 (Cal. 2004), *cert. denied*, 544 U.S. 922 (2005), cited to *Castle* without analyzing the decision.

sense that although federal licensing still exists, licenses are freely granted without reference to the strict requirements that existed under the Motor Carrier Act of 1935. *See* FMCSA Registration, Fed. Motor Carrier Safety Admin., U.S. Dep't of Transp., https://li-public.fmcsa.dot.gov/LIVIEW/PKG_REGISTRATION.prc_option (last visited Feb. 16, 2012). ATA's petition in fact essentially admits as much. Pet. 27. In these circumstances, the federal interests that underlay *Castle* no longer exist, so that the decision has no relevance to POLA's concession contract requirement.[22]

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[22] Unlike the FAAAA, the Motor Carrier Act did not contain any express safety exception to preemption. But even in the absence of a safety exception, *Castle* and related cases recognized that states and cities retained authority to require motor carriers to abide by "general safety regulations." *See, e.g., City of Chicago v. Atchison, Topeka & Santa Fe Ry. Co.*, 357 U.S. 77, 88 (1958). If certain local regulations could have escaped preemption as "general safety regulations" under such a highly regulated regime, then *a fortiori* the concession contract's safety provisions cannot be preempted under a statute that (a) does away with that regulatory scheme, and (b) incorporates an explicit safety exception to preemption.

CONCLUSION

For the reasons stated above, ATA's petition for certiorari should be denied.

Respectfully submitted,

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February 21, 2012

OPPOSITION BRIEF

No. 11-798

In The Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioners,

v.

THE CITY OF LOS ANGELES, THE HARBOR DEPARTMENT OF THE CITY OF LOS ANGELES, THE BOARD OF HARBOR COMMISSIONERS OF THE CITY OF LOS ANGELES, NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, and COALITION FOR CLEAN AIR, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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February 21, 2012

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QUESTIONS PRESENTED

The Natural Resources Defense Council, Inc., Sierra Club, and Coalition for Clean Air, Inc. join the "Restatement of Questions Presented" submitted by Respondents City of Los Angeles, *et al.*

CORPORATE DISCLOSURE STATEMENT

The Natural Resources Defense Council, Inc., Sierra Club, and Coalition for Clean Air, Inc. are nonprofit corporations which do not issue stock and which are not subsidiaries or affiliates of any publicly owned corporations.

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INTRODUCTION

Respondents the Natural Resources Defense Council, Inc. ("NRDC"), Sierra Club, and Coalition for Clean Air, Inc. (collectively "Environmental-Intervenors") are non-profit environmental organizations that collectively have nearly 1 million members, and offices throughout the United States and abroad. Environmental-Intervenors have pursued a targeted strategy – spanning over a decade – utilizing litigation, policy expertise and science to protect the public from increasing levels of air pollution generated by Port of Los Angeles (the "Port") operations. In the proceedings below, Environmental-Intervenors were defendants-intervenors-appellees and supported the concession agreement adopted by Respondents City of Los Angeles, *et al.* ("City of Los Angeles" or the "City"). We join the City's Brief in Opposition, and submit the following brief to advance one point: The Port's environmental objectives in adopting its Clean Truck Program, of which the concession agreement is a critical component, were inextricably tied to its interests in growing its commercial enterprise.

Below, we explain how the Court of Appeals' application of the market participant doctrine was based on the District Court's extensive findings of fact, which were never challenged by Petitioner American Trucking Associations, Inc. ("ATA"). Further, we explain how application of that doctrine to the Port's environmental program is consistent with case law from this Court and the circuit courts. For these reasons, and those provided by the City of Los Angeles,

ATA's petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

The Port is the leading seaport in North America in terms of shipping container volume and cargo value. Pet. App. 70a.[1] In 2008, the Port handled more than $240 billion in cargo. Pet. App. 69a. While the nation's economy benefits from the cargo moved through the Port, over two million people living near the Port, and millions more residing throughout the Los Angeles region, breathe toxic air pollution created by Port operations. Pet. App. 69a, 73a-74a. Harbor-area communities suffer an average cancer risk from air pollution that is more than 60 percent higher than the average in the region. Pet. App. 74a. Air pollution generated by port-serving trucks is a major contributor to this problem. Pet. App. 75a.

As a result of unaddressed health risks caused by Port operations, environmental and community groups effectively stalled all major Port development projects for *seven* years during a decade of exponential cargo growth at ports nationwide. Pet. App. 75a, 121a. Most notably, in 2002, NRDC obtained an injunction that halted construction of a major Port

[1] "Pet. App. XX" refers to the appendix attached to Petitioner American Trucking Associations, Inc.'s Petition for a Writ of Certiorari.

expansion project. Pet. App. 76a. The basis for the injunction was the Port's failure to fully disclose the project's environmental impacts. *Id.*; *Natural Res. Def. Council v. City of Los Angeles*, 103 Cal. App. 4th 268 (2002). This lawsuit resulted in a settlement agreement costing the Port more than $80 million. Pet. App. 77a.

In response to the environmental concerns that had blocked Port expansion, the Port changed its business model and adopted a "green growth" strategy. Pet. App. 77a, 122a. In 2006, the Port adopted its Clean Air Action Plan ("CAAP"), in which the Port committed to enacting a slate of clean air initiatives. Pet. App. 79a. The Clean Truck Program was one of those initiatives. Pet. App. 79a-80a. The CAAP states:

> The Ports recognize that their ability to accommodate the projected growth in trade will depend upon their ability to address adverse environmental impacts (and, in particular, air quality impacts) that result from such trade. The [CAAP] is designed to develop mitigation measures and incentive programs necessary to reduce health risks while allowing port development to continue.

Pet. App. 79a. The history of the Clean Truck Program demonstrates that while the Port adopted the concession agreement knowing that it would benefit the environment, the ultimate objective of the agreement was to advance the Port's economic interests.

Today, despite progress at the Port in reducing air pollution, opposition to Port growth absent meaningful environmental mitigation remains strong. For example, the Port is currently facing intense opposition related to a proposed rail yard project that may be sited on a large strip of Port-owned land four miles from its facility.[2] The project aims to increase Port cargo capacity and efficiency by enhancing rail operations.[3] Advocates of the rail yard say the project is necessary to bolster the competitiveness of the Port in anticipation of the expansion of the Panama Canal, which threatens to divert cargo from West Coast ports once completed in 2014.[4] If built, the rail yard will be located in close proximity to thousands of residents and a few hundred yards from public schools – affecting the health of Wilmington and West Long

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[2] Sean Belk, *Opposition Builds Over Port of L.A.'s Rail Yard Analysis*, Long Beach Business Journal, Jan. 31, 2012, http://lbbusinessjournal.com/long-beach-business-journal-photos-in-the-news/83-january-31st/326-opposition-builds-over-port-of-las-rail-yard-analysis-long-beach-city-officials-school-district-others-say-eir-on-bnsf-project-flawed.html.

[3] *Id.*

[4] *Id.* Advocates of the rail yard include the "Beat the Canal" campaign, *id.*, which warns that "[t]he widening of the Panama Canal now underway will give large container ships crossing the Pacific the ability to bypass ports in California and dock in East Coast and Gulf ports." Beat the Canal, http://www.beatthecanal.com/ (last visited Feb. 15, 2012). Beat the Canal advocates seek to "enhance the competitiveness of our green ports and corridors . . . by the time the widened Canal doubles current capacity when it opens in 2014." *Id.*

Beach communities.[5] Community advocates, environmentalists, academics, City of Long Beach officials, the Long Beach Unified School District, and the region's air quality regulators are concerned over how the rail yard might increase air pollution and negatively impact the quality of life of local residents, and have rallied against flaws they perceive in the environmental study for the project.[6] The controversy over this rail yard project represents the "business" challenges the Port faces due to the health risks its operations impose on the Los Angeles region. It also illustrates how any attempt by the Port to abandon its green growth strategy would severely threaten the vitality of its operations.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' APPLICATION OF THE MARKET PARTICIPANT DOCTRINE WAS BASED ON THE DISTRICT COURT'S EXTENSIVE FACTUAL FINDINGS, WHICH ATA NEVER CHALLENGED

The market participant doctrine distinguishes between the State's role as a regulator and as a market participant. *See, e.g., Engine Mfrs. Ass'n v. S.*

[5] Belk, *supra* note 2.

[6] *Id.* (referencing concerns by Long Beach officials, among others, that the project as proposed "fails to provide adequate mitigations to air quality, noise, and business impacts").

Coast Air Quality Mgmt. Dist., 498 F.3d 1031, 1040-41 (9th Cir. 2007) ("Not all actions by state or local government entities . . . constitute regulation, for such an entity, like a private person, may buy and sell or own and manage property in the marketplace."). In applying the market participant doctrine, the majority correctly[7] undertook "a single inquiry: whether the challenged program constitute[s] direct [S]tate participation in the market." Pet. App. 21a (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 435 n.7 (1980)). This inquiry is fact based.

After six days of trial, hearing the testimony from 17 witnesses, and touring the Port, the District Court detailed the specific facts of this case within 105 findings, and concluded that the concession agreement was a "business necessity." Pet. App. 122a. These facts were never challenged by ATA, and form the basis of the Court of Appeals' decision. Because these facts are critical to why the majority correctly applied the market participant doctrine to protect the concession agreement, we dedicate the remainder of this section to a discussion of them.

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[7] The City of Los Angeles' Brief in Opposition explains how the majority's reliance on the "single inquiry" test is consistent with Supreme Court precedent and the development of the market participant doctrine in other Courts of Appeals. We do not repeat that discussion here.

A. Port Operations Generate Significant Air Pollution And Health Risks

The Port is an independent, self-funding department of the City of Los Angeles. Pet. App. 68a. It is the leading container port in the United States in terms of shipping container volume and cargo volume. Pet. App. 69a. In 2008, the Port handled more than $240 billion in cargo. *Id.*

The Port operates as a landlord; it develops terminal facilities and then leases those facilities to shipping lines and stevedoring companies. Pet. App. 71a. It is located along 43 miles of the coast of San Pedro Bay, approximately 20 miles south of downtown Los Angeles adjacent to the Port of Long Beach. Pet. App. 69a. Several residential areas adjoin the Port, including the neighborhoods of San Pedro and Wilmington. *Id.* Over two million people reside in these and other communities surrounding the two ports. *Id.*

"Drayage" trucks, which haul cargo to and from the Port, are integral to the Port's operations. Pet. App. 71a-72a. The Port has a direct financial interest in the unhindered and efficient flow of cargo through its terminals and in increasing container traffic through the Port terminals. Pet. App. 72a. The Port's revenue is directly tied to the volume of containers moved through the terminals. *Id.* The greater the volume of containers handled at the Port, the greater are the Port's revenues. *Id.*

The Port expects its cargo volumes to at least double the demand for cargo-handling capacity over the next decade. *Id.* The Port faces competition from other U.S. ports and foreign ports emerging in Mexico and Canada. Pet. App. 73a. As a result, the Port needs to continually upgrade and renovate its facility, and improve the efficiency of cargo operations to maintain its competitive position and capture additional business. *Id.*

The Port is located in California's South Coast Air Basin (the "Basin"), which violates federal air quality standards for ozone and fine particulate matter. Pet. App. 73a-74a. In 2008, the Basin had the worst air quality in the nation for these pollutants. Pet. App. 74a. Emissions data from 2002 indicates that activities at the Ports of Los Angeles and Long Beach greatly contributed to the Basin's air pollution problem – producing, for example, almost one-quarter of the total diesel particulate matter emitted in the Basin. *Id.* In 2008, the South Coast Air Quality Management District ("SCAQMD") discovered that communities around the Port suffered an average cancer risk from air pollution that was more than 60 percent higher than the average in the Basin. *Id.*

Air pollution from drayage trucks greatly contribute to this problem. Pet. App. 75a. Drayage trucks that serve the Port have historically tended to be older and more polluting than those used by national long-haul truck fleets. *Id.* Drayage trucks typically start out as long-haul trucks that are then sold to smaller, lower-cost carriers who use them to the end

of their useful long-haul lives before selling the trucks to drayage carriers for Port use. *Id.* Prior to the implementation of the Clean Truck Program, drayage trucks accounted for between 10 and 24 percent of the total emissions of diesel particulate matter and nitrogen-oxides from all Port sources. *Id.* SCAQMD calculated that the Basin could not achieve federal clean air standards without significant reductions in air pollution from Port operations, including dramatic reductions in emissions from drayage trucks. Pet. App. 74a, 75a.

B. Environmental And Community Groups Stymie All Major Port Expansion Projects For Seven Years

As a result of the Port's refusal to acknowledge and abate the health risks caused by Port operations, environmental and community groups mobilized to oppose Port expansion projects and blocked a series of projects at the Port from 2001 to 2008. Pet. App. 75a.

In 2001, NRDC, the Coalition for Clean Air, and certain community groups filed a lawsuit in state court against the Port alleging that it had violated the California Environmental Quality Act with respect to an agreement it entered with the China Shipping Line Company for the lease of a new container terminal facility at the Port. Pet. App. 76a; *Natural Res. Def. Council v. City of Los Angeles*, 103 Cal. App. 4th 268 (2002). In 2002, the Second District

Court of Appeal ruled in favor of NRDC and enjoined further construction at the terminal. *Id.* The following year, the Port and NRDC reached a settlement that enabled the Port to proceed with the China Shipping expansion project subject to a number of mitigation measures. Pet. App. 76a. Pursuant to the settlement, the Port was required to establish a special fund for mitigation of air quality and aesthetic impacts in the community due to the new terminal. Pet. App. 76a-77a. The Port also committed to extensive equipment modifications in the terminal as well as requiring ships to turn off ship engines and switch to shore-side electrical power when docked, a process called "cold ironing." Pet. App. 77a. The settlement cost the Port more than $80 million. *Id.* Funds for the settlement came entirely from Port revenue, without contributions from either the City of Los Angeles or China Shipping. *Id.* Following the China Shipping settlement, the Port resolved to address air quality and environmental issues related to its operations and adopted a "green growth" strategy. *Id.*

Subsequent to the China Shipping settlement, the Port continued to face pressure from the surrounding community and environmental groups such as NRDC in connection with proposed development projects that were anticipated to result in higher levels of pollution. *Id.* For example, in 2007, NRDC opposed the Port's proposal to expand the "TraPac" terminal to 243 acres from 176, to add on-dock rail facilities, and to reconfigure area roadways to better accommodate additional traffic. *Id.* NRDC filed an

appeal with the Los Angeles City Council seeking to reverse the Port's approval of the project and indicated a willingness to initiate a lawsuit to prevent the expansion. Pet. App. 78a. The Port considered the TraPac expansion project critical because TraPac's customers, Asian shipping lines, had begun using a new generation of larger container ships, which could not be accommodated at TraPac's facilities as configured. *Id.* In the summer of 2007, three Asian shipping lines that regularly sent approximately 12,000 cargo containers per month through the TraPac terminal announced plans to take their business to the Port of Long Beach. *Id.* This decision represented a significant revenue loss for both TraPac and the Port. *Id.* Ultimately, litigation over the TraPac expansion project was averted through an agreement that permitted the project to proceed on the condition that the Port fund a study of off-port impacts on health and land use in the communities of San Pedro and Wilmington, and establish a five-year mitigation fund to offset the environmental impact of the expansion. *Id.*

C. The Port Adopts A "Green Growth" Strategy

At trial, then President of the Port Board of Harbor Commissioners ("BHC"), S. David Freeman,[8]

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[8] Mr. Freeman served as President of the Port Board of Harbor Commissioners from September 2005 until May 2009. Transcript of Proceedings (Apr. 27, 2010) at 36:24-37:4, *ATA v.*

(Continued on following page)

testified that when he was appointed to the BHC in 2005, his "management objectives" were to:

> [D]eal with the twin problems of growth and pollution. And we quickly realized that in order to grow the port, we had to abate the pollution because the people in San Pedro and Wilmington were not only angry and not only suffering from terrible air pollution, but they had learned that the law was there to protect them, and the NRDC and others had filed lawsuits, and they had stopped the port from growing. So green growth which is what we called it was an absolute business necessity for us to grow. . . . [T]he concerns we had was how we were going to continue to be Number 1 and have the jobs that came with that when we had a situation where the consumers nearby were, in effect, subsidizing the goods movements with their lungs, and everybody knew it, and they had legal power to stop us from going forward. . . .

Transcript of Proceedings (Apr. 27, 2010) at 46:6-20, 47:22-48:2, *ATA v. City of Los Angeles*, 2010 WL 3386436 (C.D. Cal. Aug. 26, 2010), *rev'd in part*, 660 F.3d 384 (9th Cir. 2011); *see also* Pet. App. 122a (quoting Mr. Freeman's trial testimony).

City of Los Angeles, 2010 WL 3386436 (C.D. Cal. Aug. 26, 2010), *rev'd in part*, 660 F.3d 384 (9th Cir. 2011). Mr. Freeman's prior work experience includes running the Tennessee Valley Authority, Lower Colorado River Authority, New York Power Authority, Los Angeles Department of Water and Power, and Sacramento Municipal Utility District. *Id.* at 38:1-16.

Consistent with these objectives, and in response to the air quality and environmental concerns that had halted Port expansion projects, the Port, jointly with the Port of Long Beach, adopted a Clean Air Action Plan ("CAAP") in November 2006. Pet. App. 79a. The CAAP states:

> The Ports recognize that their ability to accommodate the projected growth in trade will depend upon their ability to address adverse environmental impacts (and, in particular, air quality impacts) that result from such trade. The [CAAP] is designed to develop mitigation measures and incentive programs necessary to reduce health risks while allowing port development to continue.

Id. The CAAP identified trucks as a significant source of air pollution and called for the rapid replacement or retrofitting of the entire drayage truck fleet serving the Port – over 16,000 trucks – within a five-year period. Pet. App. 80a.

From November 2006 through February 2008, the two ports worked together to develop the Clean Truck Program, and held numerous meetings and workshops to gather different ideas for possible implementation. *Id.* Ultimately, the Clean Truck Program embodied several components: a progressive ban on older, more polluting trucks, a fee charged on older trucks that enter the Port, grants and subsidies funded by the Port to encourage motor carriers to replace or retrofit their older trucks, and a concession agreement that created a direct contractual

relationship between the Port and motor carriers performing drayage services. Pet. App. 83a-84a. The Port determined that requiring drayage trucks serving the Port to be registered under a concession agreement would best serve the Port's proprietary objectives of cleaner air, enhanced safety and security, and a reliable workforce. Pet. App. 85a. In connection with its decision to move forward with a concession agreement, the Port reiterated that a failure to significantly reduce the health and traffic impacts of Port operations on the millions of residents in neighboring communities would impede the Port's ability to handle increased volumes of trade in the future. Pet. App. 86a.

The Court of Appeals' ruling incorporated these facts into its opinion. *See* Pet. App. 5a-13a.

II. THE COURT OF APPEALS' APPLICATION OF THE MARKET PARTICIPANT DOCTRINE TO THE PORT'S ENVIRONMENTAL PROGRAM IS CONSISTENT WITH ESTABLISHED LAW

The record shows that while the Clean Truck Program was understood to have major environmental benefits, it was developed to promote and sustain the Port's commercial enterprise. As a result, the District Court concluded that the concession agreement was "essentially proprietary." Pet. App.

120a-124a.[9] Similarly, in affirming the District Court's application of the market participant doctrine to two of the concession agreement's provisions, the Court of Appeals held:

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[9] The District Court held:

> The Concession Agreement helps the Port manage its property and facilities as any private landlord and facilities operator would. . . . Indeed, through the Concession Agreement, [the Port] aims to secure the provision of responsible motor carrier services that are necessary for the maintenance and growth of its commercial operations. . . . As cargo volumes rise, Port revenues increase, and thus to remain competitive the Port has a strong interest in upgrading and expanding its facilities to increase cargo volumes. . . . [T]he evidence demonstrates that Port-generated air pollution interfered with Port growth and has jeopardized the Port's continued viability as a commercial enterprise. . . . [Environmental and community opposition] effectively stalled all major Port expansion projects for seven years. . . . In response, in order to be able to grow, the Port enacted the Clean Air Action Plan, which spawned the Clean Truck Program and the Concession Agreement, to mitigate Port-generated air pollution from Port-serving vehicles and equipment. . . . [T]he Port adopted the Clean Truck Program, which included the Concession Agreement as a "business necessity," in order to eliminate evident obstacles to its growth. . . . While the Port had not previously required drayage services providers to contract with it to access Port property, it made an economically driven decision to do so via the Concession Agreement in its capacity as a landlord and facilities operator.

Pet. App. 120a-123a.

> [W]hen an independent State entity manages access to its facilities, and imposes conditions similar to those that would be imposed by a private landlord in the State's position, the State may claim the market participant doctrine. . . . The Port has a financial interest in ensuring that drayage services are provided in a manner that is safe, reliable, and consistent with the Port's overall goals for facilities management. A private port owner could (and probably would) enter into concession-type agreements with licensed motor carriers in order to further its goals. . . . We therefore conclude that the Port acted in its proprietary capacity as a market participant when it decided to enter into concession agreements.

Pet. App. 29a. This decision is grounded in Supreme Court precedent and consistent with cases decided within the Ninth and Second Circuits over the last two and a half decades.

First, the Court of Appeals' ruling follows leading market participant cases where government restrictions that were adopted to protect the environment and public health were upheld against Commerce Clause and federal preemption challenges. In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809 (1976), this Court applied the market participant doctrine to uphold a Maryland program aimed at reducing the environmental impacts associated with old abandoned automobiles that littered the State's streets. The plaintiff in that case alleged that Maryland's

program violated the Commerce Clause. *Id.* at 802-03.

In *Engine Manufacturers Ass'n*, the Ninth Circuit applied the market participant doctrine to uphold air district rules that required state and local governments to purchase alternative fuel vehicles in order to reduce air pollution in the Los Angeles region. 498 F.3d at 1045-46. The industry association in that case argued that the rules were preempted by the federal Clean Air Act. *Id.* at 1035-37. And in *Sprint Spectrum v. Mills*, 283 F.3d 404, 410, 421 (2nd Cir. 2002), the Second Circuit applied the market participant doctrine to uphold restrictions placed by a school district on a telecommunications company that sought to build a cellular communications tower on a high school roof. The restrictions were necessary to protect the health and safety of schoolchildren from radio frequency emissions, and were alleged by the plaintiff to be preempted by the Telecommunications Act. *Id.* at 410.

These cases, in addition to the extensive findings made by the District Court, refute arguments by *Amici* Chamber of Commerce *et al.* that the concession agreement does not further the Port's proprietary interests because it promotes "environmental policies." Brief for the Chamber of Commerce *et al.* as *Amici Curiae* Supporting ATA, at 11-12, 16. "That a state or local governmental entity may have policy goals that it seeks to further through its participation in the market does not preclude the doctrine's application, so long as the action in question is the state's

own market participation." *Engine Mfrs. Ass'n*, 498 F.3d at 1046 (citing *Alexandria Scrap*, 426 U.S. at 809).

Second, the Court of Appeals' decision responds to the directive in *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 231-32 (1993), which instructs: "[i]n the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction." The concession agreement enables the Port to act as a private business owner in the management of its property. Pet. App. 29a. Further, the Port's green growth strategy typifies private market behavior. A recent study co-authored by MIT Sloan Management Review reports that 88% of business executives believe that "sustainability-driven strategies will be necessary to be competitive – if not right now, then soon."[10] The study went on to report that "[m]ost companies . . . are looking toward a world where

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[10] MIT Sloan Management Review and The Boston Consulting Group, *Sustainability: The 'Embracers' Seize Advantage*, at 18 (Winter 2011), *available at* http://www.bcg.com/documents/file71538.pdf. The authors of this study surveyed more than "3,000 business executives and managers from organizations located around the world," and included responses from "individuals in organizations in every major industry, ranging from those with fewer than 500 employees to those with more than 500,000 employees." *Id.* at 23.

sustainability is becoming a mainstream, if not required, part of the business strategy."[11]

Walmart has a "sustainability" program that commits the company to "be supplied 100 percent by renewable energy;" "create zero waste;" and "sell products that sustain people and the environment."[12] Proctor and Gamble – "the largest consumer packaged goods company in the world" – vows to "grow responsibly" and "accelerate [its] commitment to helping solve some of the world's sustainability challenges."[13] Patagonia, best known for its outdoor apparel, manufactures clothing from recycled material, promotes fair labor practices and safe working conditions throughout its supply chain, and encourages environmental activism on its website on issues such as river restoration and water conservation.[14] Scores of other private companies from Verizon Communications to McDonalds to Shell Oil are also implementing sustainability

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[11] *Id.*

[12] Walmart, Sustainability, http://walmartstores.com/Sustainability/ (last visited Feb. 15, 2012).

[13] Proctor & Gamble, Environmental Sustainability: Moving toward a long term vision by focusing on our products and our operations, http://www.pg.com/en_US/sustainability/environmental_sustainability/index.shtml (last visited Feb. 15, 2012).

[14] Patagonia, Patagonia's Common Threads Initiative, http://www.patagonia.com/us/common-threads/recycle (last visited Feb. 15, 2012); Patagonia, Company Info: Corporate Responsibility, http://www.patagonia.com/us/patagonia.go?assetid=37492 (last visited Feb. 15, 2012); Patagonia, Environmentalism: Take Action, http://www.patagonia.com/us/patagonia.go?assetid=58848 (last visited Feb. 15, 2012).

programs to improve their corporate image, build community goodwill, and, ultimately, increase their bottom line.[15]

We do not suggest that any action taken by the State to "green" its operations or increase its profits is protected from preemption under the market participant doctrine. Nor do the facts underlying the Court of Appeals' ruling imply that result. *See* Pet. App. 5a-13a, 25a-30a. The record amply demonstrates, under the facts of this one case, that the Port has extensive commercial interests in the concession agreement and in port drayage services. The law of this Court and that of the circuit courts protects those interests under the market participant doctrine.

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[15] *See* Verizon, Corporate Responsibility, http://responsibility.verizon.com/home/results/environment/ (last visited Feb. 15, 2012); McDonalds, The Road to Sustainability, http://www.mcdonalds.com/us/en/our_story/values_in_action/the_road_to_sustainability.html (last visited Feb 15, 2012); Shell Oil, Environment & Society, http://www.shell.com/home/content/environment_society/ (last visited Feb. 15, 2012); *see also, e.g.*, Gap, Social Responsibility, http://www.gapinc.com/content/gapinc/html/csr.html (last visited Feb. 15, 2012); Home Depot, Corporate Responsibilities, https://corporate.homedepot.com/CorporateResponsibility/Pages/default.aspx (last visited Feb. 15, 2012); Apple, Apple and the Environment, http://www.apple.com/environment/ (last visited Feb. 15, 2012); General Mills, Environment, http://www.generalmills.com/Responsibility/Environment.aspx (last visited Feb. 15, 2012); General Motors, Sustainability Report, http://www.gmsustainability.com/SUPPLY_CHAIN.html (last visited Feb. 15, 2012).

CONCLUSION

The Court of Appeals' application of the market participant doctrine is based on established law and extensive factual findings that ATA never challenged. For these reasons, and those submitted by the City of Los Angeles, ATA's petition for a writ of certiorari should be denied.

February 21, 2012

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REPLY BRIEF

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IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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49 U.S.C. § 14501(c)(1) 2, 6

REPLY BRIEF FOR PETITIONER

This case raises three recurring questions that have divided the circuits. The importance of these issues is confirmed by the briefs filed by *amici* representing multiple industries. See OOIDA Br. 2-7, 12; A4A Br. 3, 7-8, 15, 22; Chamber/NIT Br. 20-23.

The Port and other municipal respondents try to explain away the conflicts on all three issues. The intervenor-respondents focus solely on the "market participant" ruling, contending that the Port resembles an ordinary business entity because its "environmental program" is part of a "green growth strategy" aimed at "advanc[ing] the Port's economic interests," and therefore somehow escapes from the FAAAA's broad preemptive language. NRDC Opp. 1, 3, 7-9 11-20; see also Opp. 1-5, 7-8.[1] Whatever relevance the cited district court findings may have under respondents' analysis of the "market participant" issue, they are irrelevant to the correct analysis of that issue. Respondents' conflict arguments are equally unpersuasive.

I. The "Market Participant" Issue Warrants Review

Over a dissent, the Ninth Circuit majority relied on an atextual market-participant exception to FAAAA preemption that is significantly broader than the market-participant exception applied by other circuits. As we showed (Pet. 12-19 & n.5), the Ninth Circuit's decision creates or exacerbates circuit conflicts with two different lines of case law.

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[1] We cite the Port's opposition brief as "Opp." and the intervenors' opposition as "NRDC Opp."

The only decision of *this Court* that has borrowed the "market participant" doctrine developed under the dormant Commerce Clause and applied it to defeat a *preemption* defense is *Boston Harbor*, which involved *implied* preemption, not an express clause with no market-participant exception. Conflating invalidation under the dormant Commerce Clause with preemption, respondents argue otherwise (Opp. 10-11, 14-15 n.7), but there is a crucial distinction between "the default rules of the dormant Commerce Clause," which apply only when Congress has *not* acted, and express preemption, which turns on the meaning of Congress's enacted text. Chamber/NIT Br. 7-8, 13; see Pet. 10-11, 17-18, 31-32.

Congress wrote the FAAAA's preemption clause broadly. That clause nullifies all laws, regulations, and other provisions "having the force and effect of law" that "relate[] to" the statute's subject matter, except for certain delineated exclusions. 49 U.S.C. § 14501(c)(1). The delineated exclusions do *not* include an exception for market participants, even though the statute after which the FAAAA was modeled, the ADA, *does* include a narrower market-participant exception.

Respondents say that it is "beside the point" whether the requirements imposed by the Port have "'the force and effect of law.'" Opp. 13. But the fact that the Port's requirements fall squarely within the language of the FAAAA's preemption provision is better evidence of Congress's intent than an unarticulated exception borrowed from Commerce Clause cases. Respondents deride as "flatly incorrect" the suggestion that no market-participant exception should ever exist under the FAAAA, but they ignore

the Fourth Circuit's decision in *City of Charleston* v. *A Fisherman's Best, Inc.*, 310 F.3d 155 (4th Cir. 2002), (see Pet. 32) and merely cite contrary circuit decisions. Opp. 14-15. Respondents beg the question whether the contrary decisions are correct.

The FAAAA includes some exceptions but not a market-participant exception. This Court in *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008), expressly rejected an "implied 'public health' or 'tobacco' exception" to FAAAA preemption for exactly the same reason it should reject a market-participant exception. See *id.* at 374 ("The Act says nothing about a public health exception. To the contrary, it explicitly lists a set of exceptions . . ., but the list says nothing about public health.").

If a market-participant exception to FAAAA preemption exists, it must be narrowly cabined to make sure that the exception does not swallow the preemptive rule, which is broad and explicit and in furtherance of a deregulatory purpose. Respondents, however, take anything that a private actor might *conceivably* do in its own self-interest to fall on the "market participant" rather than the "regulation" side of the line. Only by such alchemy could classic regulation such as the off-street-parking and placard provisions – said unconvincingly to further environmental goals – be converted into the "proprietary" actions of a market participant.[2] But this Court has

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[2] ATA did not challenge aspects of the Clean Truck Program that existed independently of the concession agreements. The Clean Truck Program was working well, even while the challenged provisions were not being enforced because of the preliminary injunction. See Pet. App. 95a-96a. In any event, nothing the Port says suggests that it was engaged in anything

insisted that any market-participant exception to preemption be read narrowly. *E.g.*, *Chamber of Commerce* v. *Brown*, 554 U.S. 60, 70-71 (2008). And the United States correctly observed in its 2008 *amicus* brief: "Governmental action does not lose its regulatory nature simply because it is motivated by a desire to attract certain persons or businesses to a particular jurisdiction." U.S. *Amicus* Br. 25.[3]

Respondents cannot meaningfully distinguish the Fifth Circuit's conflicting decision in *Smith* v. *Department of Agriculture*, 630 F.2d 1081 (1980), or the circuit decisions that have followed the plurality opinion in *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82 (1984). *Smith* held that a State cannot take advantage of any market-participant doctrine by using its *ownership* of a facility to claim that it was participating in markets operating within the facility. *Smith* cannot be distinguished on the miscellaneous factual grounds respondents claim (Opp. 16-19), which have no bearing on the governing legal principles. For example, it cannot be distinguished on the ground that the Port here is a "commercial enterprise," because so was the farmer's market. See *Smith*, 630 F.2d at 1082 (noting that State charged rent for space

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other than the kind of regulation that has never come within any market-participant exception to preemption.

[3] The Port tries to dismiss the United States' 2008 *amicus* brief because the brief was filed before the district court's "detailed factual findings" purportedly supporting the market-participant holding below. Opp. 12 n.5. However, the United States grounded its *amicus* position on the fact that "'[t]he Ports do not participate in any relevant market'" and should not be permitted to use their control over a key avenue of interstate commerce "'to erect substantial impediments to the free flow of commerce.'" Pet. 18. That remains true now.

in the market). Nor does the larger *size* of the Port (Opp. 18) say anything about whether the Port is setting conditions on a market in which it does not participate.

Respondents make no effort to reconcile the Ninth Circuit's decision with the plurality opinion in *Wunnicke*. Instead, they dispute that numerous circuits have followed the *Wunnicke* plurality. But those cases' legal analysis follows the *Wunnicke* plurality opinion. See, *e.g.*, *GSW, Inc.* v. *Long Cnty., Ga.*, 999 F.2d 1508, 1515-16 (11th Cir. 1993) (concluding that *Wunnicke* should be applied *even more broadly* than situations "where the state is imposing a downstream restraint on a market in which it is not a participant"); *Huish Detergents, Inc.* v. *Warren Cnty., Ky.*, 214 F.3d 707, 716 (6th Cir. 2000) (following *Wunnicke* plurality); *Nat'l Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 63 (1st Cir. 1999) (including *Wunnicke* in discussion of "controlling Supreme Court precedent"), aff'd sub nom. *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). Respondents note that the cases accurately describe *Wunnicke* as a plurality opinion (Opp. 21), but the point is that they adopt that opinion as circuit law, not that they mistake it for a holding of this Court.

Finally, respondents dispute our showing (Pet. 15-19) that the Ninth Circuit's decision conflicts with the FAAAA decisions of other circuits because it allows the Port to impose restrictions wholly divorced from any governmental interest in the "efficient procurement" of goods or services. Opp. 22-26; see also Pet. App. 25a. The language from the majority opinion quoted by respondents (Opp. 24-25), however, only confirms that the Ninth Circuit rejected that

crucial limitation.[4] Review is warranted to address the pervasive conflicts concerning the validity and scope of a "market participant" exception in this setting.

II. The Court Should Also Resolve the Circuit Conflict over When a State Regulation Is "Related to a Price, Route, or Service"

The Ninth Circuit held that requirements *directly targeting* motor carriers and imposed by the Port through mandatory concession agreements were not "related to a price, route, or service of any motor carrier" under 49 U.S.C. § 14501(c)(1). Pet. App. 17a-18a, 21a, 33a-34a. That holding rested on a cramped reading of "rates, routes, or services" that has long conflicted with the positions of other circuits. See Pet. 20, 24-26. It also rested on a narrow interpretation of the words "related to" that is at odds with decisions of other circuits and this Court involving identical language in the ADA and ERISA. See Pet. 20-24; A4A Br. 4-7. Respondents' efforts to explain away these substantial conflicts are unavailing.

A. Although conceding that ADA cases are "relevant" (Opp. 27), respondents attempt to distinguish *Goodspeed Airport LLC* v. *E. Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, 212

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[4] In the face of the Ninth Circuit's conclusion to the contrary, respondents assert that the Port here actually did "engage in the procurement of drayage services" (Opp. 25) through its creation of an "incentive program to support acquisition of clean trucks." Pet. App. 4a. Whatever participation in the market for drayage *trucks* this incentive program may have entailed, it provides no reason to think that the Port either procured or provided drayage *services* and thus no reason to think the Port's restrictions were directed at the efficient procurement of such services.

(2d Cir. 2011), and *Branche* v. *Airtran Airways, Inc.*, 342 F.3d 1248, 1258-1259 (11th Cir. 2003). See Opp. 29 n.16; cf. Pet. 22-23. They point out that the Second Circuit, in holding that the ADA did not expressly preempt certain "generally applicable state laws," observed that its decision was based in part "on the facts before" the court (*Goodspeed Airport*, 634 F.3d at 212). Opp. 29 n.16. True enough, but the "facts" the Second Circuit deemed significant *included* the failure of the challenged Connecticut wetlands laws to "refer to aviation or airports." 634 F.3d. at 211. In *Branche*, the Eleventh Circuit rejected a preemption argument under the ADA, but in marked contrast with the decision below the court based its ruling on an interpretation of "relates to" that *includes* state laws that "directly regulate[]" or "'expressly refer[] to'" the "services" of an air carrier. 342 F.3d at 1259.

Respondents contend that ERISA cases construing the "relates to" language are inapposite because ERISA's preemption clause *also* includes certain language that *differs* from the FAAAA. Opp. 27-29. That argument is foreclosed by *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992), which "adopt[ed]" for use under the ADA the "same" meaning of "relates to" articulated under ERISA.[5]

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[5] Nothing about the petition's reliance on ERISA cases contradicts the position we took in the Ninth Circuit. The passage in our reply brief on which the Port relies (Opp. 27) did not suggest that ERISA cases are *categorically irrelevant* to interpretation of the FAAAA's preemption clause. Instead, we argued that *market-participant* cases involving the Commerce Clause, NLRA, and ERISA "do not control this case" because Commerce Clause cases are "constitutional," the NLRA "has no express preemption clause," and ERISA's preemption scheme

Finally, respondents suggest (Opp. 29-30) that our reading of "related to" is inconsistent with *Morales* and *Rowe*. In *Morales*, however, this Court acknowledged that the parallel ADA preemption provision broadly nullifies state regulations that "hav[e] a connection with *or reference to*" airline (or truckers') "'rates, routes, or services.'" *Morales*, 504 U.S. at 384 (emphasis added). *Rowe*, 552 U.S. at 371, explained that there is FAAAA preemption because the Maine law at issue "focuses on trucking and other motor carrier services . . ., thereby creating a direct 'connection with' motor carrier services." It is the Ninth Circuit's approach that is incompatible with *Rowe* and *Morales*. See generally A4A Br. 16-19.

B. Respondents admit the existence of a "pre-*Rowe* split among [the] circuits as to the breadth of the statutory term 'services.'" Opp. 30. Since *Rowe*, two additional circuits have adopted a broad understanding of "services" and rejected the Ninth Circuit's "public utility" understanding. See Pet. 25. As one of those circuits has explained, moreover, *Rowe*'s expansive use of the term "service" to encompass provisions that did not fit within the "public utility" understanding reflects a rejection of the Ninth Circuit's minority position. Pet. 25; see also A4A Br. 19-22.

Trying to make a virtue of necessity, respondents say that there is no need for this Court to grant review because the circuit split has been "superseded" by *Rowe*. Opp. 30-31. Their problem, however, is that the Ninth Circuit's approach falls on the wrong side of the line between the superseded and what has replaced it.

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differs in material ways from the FAAAA's. Pet. C.A. Reply Br. 5, No. 10-56465.

Respondents contend that the Ninth Circuit's decision "did not turn" on the "public utility" interpretation of "services." Opp. 31. But the Ninth Circuit *specifically invoked* the narrow "public utility" definition, explaining:

> The terms "rates, routes, and services" were "used by Congress in the public utility sense; that is, service refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided.... Rates indicates price; routes refers to courses of travel."

Pet. App. 17a (quoting *Air Transp. Ass'n of Am.* v. *City & Cnty. of San Francisco*, 266 F.3d 1064, 1071 (9th Cir. 2001)). In holding that the financial capability provision was *not* covered by the FAAAA's preemption provision, both the Ninth Circuit and the district court relied on the *legal* conclusion that "the provision did not relate to *rates, routes, and services* in more than a tenuous way." Pet. App. 33a (emphasis added); see also *id.* at 33a-34a.

III. Review Is Needed To Bring the Ninth Circuit into Conformity with *Castle*

In *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61, 64 (1954), this Court held that States lack the authority to enforce their laws through even a "partial suspension" of a federally licensed motor carrier's ability to operate in interstate commerce. The decision below conflicts with *Castle* and intrudes on the federal government's "exclusive authority and limited discretion to grant or deny operating authority" to an interstate motor carrier. OOIDA Br. 11; see Pet. 26-29. The Ninth Circuit's suggestion that *Castle* forbids only "comprehensive ban[s]" (Pet.

App 32a) is incompatible with this Court's reasoning. As Judge Smith correctly noted in dissent, "[b]arring access to the Port of Los Angeles" is tantamount to "a 'partial suspension' of drayage carriers' federal permits to transport goods in the stream of interstate commerce." Pet. App. 55a-56a.

Respondents argue that *Castle*'s limitation on state remedial authority applies only to "comprehensive bans," but they fail to address *Castle*'s reference to partial suspensions. The only authority respondents can muster is a *dormant Commerce Clause* case decided more than 20 years before *Castle* and before passage of the Motor Carrier Act of 1935, which greatly reduced the States' power over interstate motor carriers. See Opp. 35 & n.19 (citing *Bradley* v. *Public Utils. Comm'n of Ohio*, 289 U.S. 92 (1933)); Pet. 26. That is far afield indeed.

Respondents argue that *Castle* is no longer good law. Opp. 36-38. But the Ninth Circuit declined to decide whether the FAAAA, passed long after *Castle*, "incorporated (rather than modified) *Castle*'s limitations on the State's authority." Pet. App. 32a & n.14.

Respondents contend that changes in motor carrier regulation since *Castle* have rendered that decision obsolete. Opp. 37-38. But they make no effort to address the detailed argument to the contrary made in the petition (at 27-28) and the OOIDA *amicus* brief (at 10-12), or to explain why (if respondents are correct) the United States relied on *Castle* in its *amicus* filing earlier in this case. See Pet. 33; see also Pet. App. 157a. The United States' filing also refutes respondents' suggestion that "the

federal interests that underlay *Castle* no longer exist." Opp. 38.

Finally, respondents suggest that *Castle*'s analysis has been "'significantly qualified'" by this Court's decisions, which "recognize[] that states and cities retain[] authority" to impose safety restrictions despite the existence of federal preemption. Opp. 37, 38 n.22 (quoting *Fla. Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 141-42 (1963)). This is doubly incorrect. First, our argument is not that true safety provisions are *preempted* but rather that the *remedy or penalty* of denying federally licensed motor carriers access to the Port of Los Angeles is inconsistent with *Castle*, even if non-preempted safety provisions are violated. Second, the suggestion that *Florida Lime* casts doubt on *Castle*'s continuing validity is wrong. In fact, in several cases cited in the petition (and in the United States' 2008 *amicus* filing), this Court reaffirmed the basic principle adopted in *Castle*. See Pet. 28 (citing *City of Chicago* v. *Atchison, Topeka & Santa Fe Ry.*, 357 U.S. 77, 85 (1958), and *R.R. Transfer Serv., Inc.* v. *City of Chicago*, 386 U.S. 351, 359 (1967)).

The principle that *Florida Lime* said had been "significantly qualified" was not the holding of *Castle* but rather the proposition that "a federal license or certificate of compliance with minimum federal standards immunizes the licensed commerce from inconsistent or more demanding state regulations." 373 U.S. at 141-42 (citing, *e.g.*, *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 447-48 (1960)). In *Huron*, this Court, in rejecting a Commerce Clause challenge to a provision of Detroit's Smoke Abatement Code that applied to certain ships

operating in interstate commerce, emphasized that "[t]he ordinance *does not exclude a licensed vessel from the Port of Detroit*, nor does it destroy the right of free passage." 362 U.S. at 448 (emphasis added). Even if *Florida Lime* had been referring to "qualifi[cations]" on *Castle*, then, those qualifications plainly did not include allowing a port to "exclude a licensed" carrier from the port.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 6, 2012

AMICUS CURIAE BRIEF

No. 11-798

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., PETITIONER

v.

CITY OF LOS ANGELES, CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Section 14501(c) of Title 49 preempts a state or local "law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier * * * with respect to the transportation of property." 49 U.S.C. 14501(c)(1). Through concession agreements, the Port of Los Angeles, a municipal entity, requires motor carriers providing drayage services at the Port to comply with a number of requirements, including (i) submitting an off-street parking plan; (ii) displaying on vehicles placards that provide a phone number for members of the public to report environmental or safety concerns; and (iii) demonstrating that the carrier has sufficient financial resources to perform its obligations under the agreement.

The questions presented are as follows:

1. Whether the off-street parking and placard requirements are not preempted by Section 14501(c) because they lack "the force and effect of law."

2. Whether the financial-capability requirement is not preempted by Section 14501(c) because it is not "related to a price, route, or service of any motor carrier."

3. Whether *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954), prohibits a municipal entity from imposing requirements on interstate motor carriers entering a port.

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In the Supreme Court of the United States

No. 11-798

AMERICAN TRUCKING ASSOCIATIONS, INC., PETITIONER

v.

CITY OF LOS ANGELES, CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari in No. 11-798 should be denied.

STATEMENT

1. In 1980, Congress deregulated the trucking industry. See Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793; *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008). Fourteen years later, Congress enacted the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, 108 Stat. 1569, which included a provision preempting state and local regulation of trucking. See *id.* § 601(c), 108 Stat. 1606. That provision, now codified at Section 14501(c) of Title 49, generally bars state or local governments from "enact[ing] or enforc[ing] a law, regu-

lation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier." 49 U.S.C. 14501(c)(1). A "motor carrier" is defined as "a person providing commercial motor vehicle * * * transportation for compensation." 49 U.S.C. 13102(14). Section 14501(c) exempts from preemption, *inter alia*, an exercise of "the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. 14501(c)(2)(A).

In *Rowe*, this Court held that certain Maine laws regulating the delivery of tobacco products were "related to a price, route, or service of any motor carrier" and therefore preempted. 49 U.S.C. 14501(c)(1); *Rowe*, 552 U.S. at 367. The Court noted that the operative language of Section 14501(c) was modeled on the preemption provision of the Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, 92 Stat. 1705, which Congress enacted to promote "maximum reliance on competitive market forces" in the airline industry. *Rowe*, 552 U.S. at 367 (quoting *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)). Relying on its prior construction of the ADA provision, the Court held that "pre-emption may occur even if a state law's effect on rates, routes, or services 'is only indirect'" and that "pre-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives." *Id.* at 370-371 (quoting *Morales*, 504 U.S. at 386, 390). The Court stated, however, that state laws are not preempted where they have only a "tenuous, remote, or peripheral" connection to motor carriers' prices, routes, and services. *Id.* at 375.

2. a. The Port of Los Angeles is an independent division of the City of Los Angeles. Pet. App. 5a. It owns

terminal facilities and leases those facilities to shipping lines and stevedoring companies, which load and unload cargo from docking ships. *Id.* at 5a-6a. This cargo is placed onto drayage trucks, which transport goods to customers or long-distance shippers. *Id.* at 6a. Motor carriers provide drayage services through arrangements with ocean carriers, cargo owners, and others, but do not enter into drayage contracts with the Port itself. *Id.* at 71a.

On the basis of a provision adopted in 2008, the Port prohibited drayage-service providers from using the facilities unless they had entered into "concession agreements" with the Port. Pet. App. 4a, 5a. Those agreements impose a number of requirements. As particularly relevant here, they require a drayage-service provider to (i) submit an off-street parking plan for all its permitted trucks; (ii) display on its trucks placards that provide a phone number for reporting environmental or safety concerns; and (iii) demonstrate that the carrier has sufficient financial resources to perform its obligations under the agreement.

b. Petitioner, a trucking-industry trade group, filed a complaint against the City of Los Angeles and the Port in July 2008 in the United States District Court for the Central District of California, seeking to enjoin provisions of the concession agreements. Pet. App. 61a. There followed two years of litigation over petitioner's request for a preliminary injunction, including two appeals to the Ninth Circuit. See *id.* at 61a-64a. Appearing as amicus curiae in the first appeal, the United States argued that "the concession agreements at issue fall squarely within the FAAAA's preemptive scope," and that at least some of the provisions could not qualify for the safety exemption. See Gov't C.A. Br. 7-18, 08-

56503 Docket entry No. 34 (Oct. 20, 2008). It also argued that the contention that the Port was exempt from Section 14501(c) as a "market participant[]" lacked merit because the Port does "not participate in any relevant market." *Id.* at 23, 25. The district court ultimately granted a preliminary injunction with respect to three of the challenged provisions. Pet. App. 203a.

The district court then held a bench trial in April 2010 to determine whether to permanently enjoin five challenged provisions. In addition to the off-street parking, placard, and financial-capability provisions, the court considered a requirement that drayage-service providers ensure that vehicle maintenance is conducted in accordance with manufacturers' instructions and a requirement that they use only employee-drivers, not independent owner-operators of drayage trucks. See Pet. App. 12a-13a. After making extensive factual findings, the court found none of the provisions preempted. *Id.* at 137a.

c. A divided panel of the court of appeals largely affirmed the district court, reversing only as to the employee-driver provision (a holding that respondents have not challenged in this Court through a cross-petition for a writ of certiorari). Pet. App. 41a-44a.

The court of appeals began by explaining that "[i]n determining whether § 14501(c)(1) * * * preempts State action, we ask three questions." Pet. App. 16a. "First, we must consider whether the provision 'relate[s] to a price, route, or service of a motor carrier.'" *Ibid.* (citing *Rowe*, 552 U.S. at 368). "If the answer is yes, we must consider whether the provision 'has the force and effect of law'—that is, whether the provision was enacted pursuant to the State's regulation of the market, rather than the State's participation in the market in a

proprietary capacity." *Ibid.* The court held that although market participation often takes the form of a government entity's procurement of goods or services, an entity can also act as a market participant when it "manages access to its facilities, and imposes conditions similar to those that would be imposed by a private landlord." *Id.* at 23a-29a. Finally, the court stated, if the challenged provision meets both of those requirements for preemption, it must be determined whether Section 14501(c)'s "express exemptions save the regulation from preemption." *Id.* at 16a.

Applying that framework, the court of appeals first held that the financial-capability provision is not "related to a price, route, or service of any motor carrier." See Pet. App. 33a-34a. It rested that conclusion on the district court's finding that the Port was unlikely to invoke the provision to deny any drayage-service provider access to the Port. *Id.* at 34a. Based in part on "[t]estimony by [petitioner's] licensed motor carrier witnesses," the district court had determined that "the provision would have no effect on prices, routes, or services." *Id.* at 104a. The court of appeals found that conclusion "well supported by the record." *Id.* at 34a.

The court of appeals further held that the off-street parking and placard provisions do not have "the force and effect of law" because, rather than regulating the drayage market, they advance the Port's own interest as a participant "in the market as a manager of Port facilities." Pet. App. 25a; see also *id.* at 38a-41a, 44a-46a. The court viewed the concession agreements as "contracts under which the Port exchanges access to its property for a drayage carrier's compliance with certain conditions." *Id.* at 25a. The off-street parking and placard requirements, it concluded, were "designed to ad-

dress specific proprietary problems"—in particular, the need to "increase the community good-will necessary to facilitate Port expansion." *Id.* at 40a; see *id.* at 46a.[1]

Finally, the court of appeals held that the maintenance requirement falls within the safety exception to Section 14501(c). Pet. App. 34a-38a. Although it "agree[d] with the district court that the maintenance provision has only a tenuous and remote connection to rates, routes, and services," it did not "rest [its] holding on this ground." *Id.* at 35a n.15.

DISCUSSION

This case does not warrant further review. Although the Ninth Circuit erred in its application of Section 14501(c), its decision does not conflict with the decision of any other circuit.

A. The Ninth Circuit Erroneously Held That The Off-Street Parking And Placard Requirements Are Valid Because The Port Of Los Angeles Imposed Them In A Market-Participant Capacity, But That Factbound Determination Does Not Warrant Further Review

The Ninth Circuit did not hold that the off-street parking and placard requirements are not "related to a price, route, or service" within the meaning of Section 14501(c), Pet. App. 38-41a, 44-46a; rather, it held that these requirements are not preempted on the rationale that the Port of Los Angeles imposed them as a market

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[1] The court of appeals found that the placard provision comes within Section 14501(c)'s safety exception but concluded that if it had "the force and effect of law," it could be separately preempted by 49 U.S.C. 14506(a), which displaces requirements that motor carriers "display any form of identification" and contains no safety exception. Pet. App. 46a.

participant, *ibid.*[2] That ruling was erroneous, but it does not create or exacerbate any conflict of authority among the circuits.

1. As an initial matter, petitioner is wrong to suggest that the status of a government entity as a market participant is irrelevant to whether Section 14501(c) applies. See, *e.g.*, Pet. 11, 12, 29-30. Section 14501(c) preempts only a "law, regulation, or other provision having the force and effect of law." Like the Ninth Circuit below, other circuits to consider the issue have concluded that "by excluding government actions without the force of law," Section 14501(c) "seems to invite" an inquiry into whether a government entity has acted merely as a market participant by entering into arms-length agreements that impose contractual rather than legal obligations on other market participants. *Cardinal Towing & Auto Repair, Inc.* v. *City of Bedford, Tex.*, 180 F.3d 686, 694-696 (5th Cir. 1999); see also *Mason & Dixon Lines Inc.* v. *Steudle*, 683 F.3d 289, 294-296 (6th Cir. 2012).

For that reason, the market participant doctrine, developed in connection with this Court's "dormant" Commerce Clause and implied-preemption cases, usefully informs judicial consideration of whether a requirement has "the force and effect of law." Cf. *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 228-229 & n.5 (1995). The chief inquiry set forth in those decisions is

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[2] Those provisions are not saved from preemption under the safety exception contained in Section 14501(c). The off-street parking requirement is "insufficiently related to motor vehicle safety so as to fall within the safety exception" of Section 14501(c), Pet. App. 108a-109a (internal quotation marks omitted), and the placard requirement is independently preempted by Section 14506(a), which contains no safety exception, see n.1, *supra*.

whether a government entity seeks to further its own proprietary interests rather than general regulatory policies. See, *e.g.*, *Chamber of Commerce* v. *Brown*, 554 U.S. 60, 70 (2008); *Building & Constr. Trades Council* v. *Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 232 (1993) (*Associated Builders*). Thus, for example, in *Wisconsin Department of Industry, Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282 (1986), this Court held that a Wisconsin statute barring repeat violators of the National Labor Relations Act (NLRA) from doing business with the State was preempted. See *id.* at 283. The "manifest purpose and inevitable effect" of the statute, the Court reasoned, was "to enforce the requirements of the NLRA," rather than to respond "to state procurement constraints or to local economic needs." *Id.* at 291. Similarly, a requirement that has the purpose and effect of regulating the trucking industry rather than advancing a government entity's proprietary interests would have "the force and effect of law" under Section 14501(c).

Of course, whether a government entity has sought to advance its own proprietary interests is not the only question that a court must answer to determine whether a requirement has "the force and effect of law." Despite such a purpose, for example, a government entity "acts as a market regulator when it employs tools in pursuit of compliance that no private actor could wield, such as the threat of civil fines, criminal fines and incarceration." *United Haulers Ass'n* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 438 F.3d 150, 157 (2d Cir. 2006), aff'd, 550 U.S. 330 (2007). Ultimately, the question whether a requirement imposed by a public entity like a port, which often engages in activity with both commercial and regulatory characteristics, has "the force and effect of law"

turns on a close evaluation of its factual and legal context.

2. The court of appeals erred in holding that the off-street parking and placard provisions are not preempted. See Pet. App. 38a-41a, 45a-46a. Four considerations, taken together, indicate that the provisions have "the force and effect of law" and thus are not imposed by the Port merely as a market participant.

First, the requirement that drayage-service providers enter into concession agreements is incorporated into a tariff that is "penally enforceable." Pet. App. 83a n.5. The tariff provides that any violation of its provisions constitutes a misdemeanor subjecting the violator to a fine of $500 and imprisonment of up to six months, and that "[e]ach person shall be guilty of a separate offense for each and every day during any portion of which any violation of any provision of this Tariff is committed." 4 C.A. E.R. 712 (Tariff No. 4, Item No. 220(b)).[3] Any common-sense understanding of the term "force and effect of law" is satisfied by a provision backed by "criminal penalties which only a state and not a mere proprietor can enforce." *Washington State Bldg. & Constr. Trades Council, AFL-CIO* v. *Spellman*, 684 F.2d 627, 631 (9th Cir. 1982), cert. denied, 461 U.S. 913 (1983).

Second, a container port like the Port of Los Angeles is far more akin to publicly managed transportation infrastructure, like a highway or a bridge, than to an ordinary commercial operation. Like the Port of Los Angeles, the largest container ports in the Nation are owned and administered by public agencies. See U.S. Dep't of Transportation, Bureau of Transportation Statistics,

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[3] See http://www.portoflosangeles.org/Tariff/SEC02.pdf.

America's Container Ports: Linking Markets at Home and Abroad 6 (2011) (listing twenty largest container ports). A port manages access to channels of interstate and international trade and often exercises near-monopoly power within a region. Indeed, any drayage-service provider that seeks to do business in the Los Angeles region has little choice but to accede to the concession agreements or agreements required by the physically integrated Port of Long Beach.[4] For that reason, the agreements resemble licenses more than ordinary arms-length commercial contracts. Although the Port faces competition from other public ports, Pet. App. 73a, it is common for regulatory agencies, such as agencies overseeing industrial development, housing, and parkland, to compete in this sense with counterpart agencies of other sovereigns and municipalities to attract investment to their region.

Third, the Port of Los Angeles does not itself contract with drayage-service providers (apart from the concession agreements themselves). See Pet. App. 50a (Smith, J., dissenting in part). Standing alone, that fact is not fatal; in appropriate circumstances, a government entity can act as a market participant when it seeks to affect a different but integrally related market. But that more attenuated relationship calls for a more substantial commercial justification to dispel the inference that the government entity is "using its leverage in [one] market to exert a regulatory effect in [another] market." *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 98 (1984) (opinion of White, J.).

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[4] The Port of Long Beach "form[s] a single physical Port" with the Port of Los Angeles, "although they are managed independently." Pet. App. 7a n.5.

Finally, the two specific provisions that the Ninth Circuit upheld on market-participant grounds are more regulatory than commercial in character. They are both provisions of general applicability insofar as they govern on a permanent basis all drayage-service providers that wish to gain access to the Port, and they each concern quintessential functions of local government (parking and vehicle identification). Neither provision is "specifically tailored to one particular [transaction]," nor are they responsive "to state procurement constraints or to local economic needs." *Chamber of Commerce*, 554 U.S. at 70 (quoting *Associated Builders*, 507 U.S. at 232, and *Gould*, 475 U.S. at 291); see also Pet. App. 23a. Rather, as the district court found, they "were designed specifically to generate goodwill among local residents and to minimize exposure to litigation from them." *Id.* at 127a; see also *id.* at 40a, 46a. Although the court of appeals was correct that "[e]nhancing good-will in the community" can be an "objectively reasonable business interest," *id.* at 40a, a government entity could convincingly claim such an interest for even the most thinly veiled regulatory action. It therefore cannot suffice to establish that an action constitutes market participation.

To be sure, there are some considerations that might be thought to cut the other way. The Port is "self-sustaining solely from revenues it receives from property leases and fees for dockage," not taxpayer-funded, Pet. App. 70a, 78a-79a; a steady "supply of drayage trucks and drivers is integral to cargo movement at the Port," *id.* at 28a; and its expansion has been impeded by community opposition and costly lawsuits that the concession agreements are intended to help avert, *id.* at 72a-73a, 75a. Moreover, the mere fact that the concession agreements were prompted in part by environmen-

tal concerns does not categorically render them non-proprietary. See *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 809 (1976). Numerous Fortune 500 companies have launched similar "green" initiatives. See NRDC Br. in Opp. 18-20. Nonetheless, on balance, the off-street parking and placard provisions have "the force and effect of law" and should therefore be preempted.

3. The Ninth Circuit's market-participant holding does not conflict with any decision of another court of appeals. It therefore does not warrant further review.

a. Petitioner's first contention is that the decision below conflicts with decisions of other circuits because it "permits a municipal entity, as a supposed market participant, to set conditions on a market in which it does not participate." Pet. 12. None of the cases cited by petitioner to support this assertion involved the FAAAA, and they therefore did not interpret the phrase "force and effect of law." In any event, the broader reasoning of those cases does not conflict with the Ninth Circuit's analysis below.

Petitioner claims, for example, that the holding conflicts with the Fifth Circuit's pre-FAAAA decision in *Smith* v. *Department of Agriculture*, 630 F.2d 1081 (1980), cert. denied, 452 U.S. 910 (1981). In *Smith*, the Fifth Circuit held that a state regulation relegating nonresidents to inferior sales locations at a state-operated farmer's market was barred by the dormant Commerce Clause. See *id.* at 1082. In a one-paragraph analysis rejecting the State's market-participant defense, the Fifth Circuit found significant that the State did not participate in the produce market but rather had "simply provided a suitable marketplace for the buying and selling of privately owned goods." *Id.* at 1083. Accord-

ingly, the court concluded, "its essential role is that of market regulator." *Ibid.*

Smith did not appear to consider whether, even though the State did not participate directly in the market for produce, it had commercial interests as a manager of the property integrally linked to the functioning of that market—the basis for the Ninth Circuit's decision below. See Pet. App. 28a ("The drayage and port markets are so closely related that the Port's interest in managing its facilities can extend to imposing conditions on drayage carriers that operate on Port property."). That is unsurprising in light of the facts of the case: In *Smith*, there was no plausible argument that the discriminatory restriction related to the State's commercial interest in managing its property, because "the admitted purpose of the rule was to give a preference to Georgia residents over non-residents of Georgia, thereby providing a competitive advantage to Georgia farmers." 630 F.2d at 1082. The Fifth Circuit therefore did not have occasion to consider the circumstance confronted by the Ninth Circuit below.

Petitioner also argues that the decision below conflicts with decisions from other circuits adopting the conclusion of the plurality opinion in *Wunnicke*, another dormant Commerce Clause case. The state law invalidated in *Wunnicke* required purchasers of timber from a state agency to process it within the State before exporting it. Four of the eight participating Justices concluded that "although the State may be a participant in the timber market, it is using its leverage in that market to exert a regulatory effect in the processing market, in which it is not a participant." 467 U.S. at 98 (opinion of White, J.). The plurality based this reasoning on the belief that "[i]n the commercial context, the seller usually

has no say over, and no interest in, how the product is to be used after sale." *Id.* at 96.

There is no conflict between the *Wunnicke* plurality opinion and the decision below. As an opinion cited by petitioner (Pet. 14 n.5) explains, *Wunnicke* was concerned with "'downstream regulation'" of goods; "[t]he case turned on the plurality's conclusion that the processing requirement constituted a 'restrictio[n] on dispositions subsequent to the goods coming to rest in private hands.'" *Department of Revenue* v. *Davis*, 553 U.S. 328, 349 n.17 (2008) (opinion of Souter, J.) (quoting *Wunnicke*, 467 U.S. at 98, 99 (opinion of White, J.)) (second alteration in original); see also *id.* at 374 (Kennedy, J., dissenting); *Antilles Cement Corp.* v. *Acevedo Vila*, 408 F.3d 41, 47 (1st Cir. 2005) (cited Pet. 14 n.5) (explaining that under *Wunnicke* market participation "does not extend to hybrid proprietary/regulatory activities that have downstream effects"). Such downstream regulation of products sold by a government entity is not at issue here.

To be sure, the *Wunnicke* plurality stated that "[t]he limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further." 467 U.S. at 97. But the plurality had no reason to consider the circumstance as perceived by the Ninth Circuit here, in which a government entity "manages access to its facilities, and imposes conditions similar to those that would be imposed by a private landlord" on participants in a different market who use those facilities. Pet. App. 29a.

b. Petitioner also argues that the decision below creates a second circuit conflict because "it allows the Port to impose restrictions wholly divorced from any gov-

ernmental interest in the 'efficient procurement' of goods or services." Pet. 12, 15-19. But none of the cases it cites contradicts that holding. Rather, each of the decisions merely concluded that action in furtherance of "efficient procurement" is *sufficient* to qualify as market participation, not that it is necessary. See, *e.g.*, *Cardinal Towing*, 180 F.3d at 693-696.

Indeed, as the Ninth Circuit explained below, limiting a government entity's market participation to the efficient procurement of goods and services for the operation of government would conflict with this Court's holding in *Hughes*. See Pet. App. 24a. In *Hughes*, the Court rejected a dormant Commerce Clause challenge to a Maryland statute that gave Maryland companies that destroyed out-of-use vehicles an advantage over out-of-state companies in obtaining a bounty from the State, finding that the State was a market participant. See 426 U.S. at 796-810. The Court did not suggest that the law furthered efficient procurement but rather found that its purpose was "protecting the State's environment." *Id.* at 809.

Moreover, there are other contexts where a State clearly acts as a market participant despite the fact that its activity is not aimed at the procurement of goods or services, such as the production and sale of natural resources, see *Wunnicke*, *supra*, and finished products, see *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 440 (1980). The dissent in *Reeves*, in fact, pointed out that the majority had extended the market-participant exception to the dormant Commerce Clause beyond "procuring goods and services for the operation of government." *Id.* at 450 (Powell, J., dissenting); see also *id.* at 436 n.8 (opinion of the Court). The Ninth Circuit was thus correct that while the "efficient procurement" inquiry is "useful

in cases where the government is buying goods or seeking services, * * * it is not the be-all-and-end-all of proprietary action." Pet. App. 25a.

B. The Ninth Circuit's Conclusion That The Financial-Capability Provision Is Not Related To A Price, Route, Or Service Rested On A Factual Conclusion Not Challenged By Petitioner

Petitioner's second question presented asks this Court to resolve alleged conflicts over the meaning of "related to a price, route, or service" in Section 14501(c). See Pet. 20. But although petitioner obscures the point, see Pet. 20, 23, 26, the only provision of the concession agreements that the court of appeals upheld on the basis that it is not "related to a price, route, or service" was the financial-capability provision, Pet. App. 33a-34a. That conclusion rested on the district court's unchallenged factual finding that the provision "would have no effect on prices, routes, or services." *Id.* at 104a. This case therefore does not implicate the conflicts of authority that petitioner has posited.

1. The financial-capability provision requires a drayage-service provider to demonstrate that it has sufficient financial resources to perform its obligations under the concession agreement. In the Ninth Circuit, the United States argued that this provision, like every other provision incorporated into the concession agreements, "directly relate[s] to motor carriers' routes and services and therefore fall[s] within the FAAAA's preemptive scope" because the "agreements essentially impose a licensing requirement on motor carriers seeking to provide drayage services to those customers within the Ports." Gov't C.A. Br. 6. The government concluded that some of the provisions are therefore clearly

preempted, while others might come within Section 14501(c)'s safety exception. See *id.* at 7.

In ultimately upholding the financial-capacity provision, however, the court of appeals rested on what it perceived to be the district court's finding that it is unlikely that the requirement would actually be enforced to bar access to the Port. The court stated that the "district court disagreed" with petitioner's argument that "the provision 'gives [the Port] discretion to deny [licensed motor carriers] the right to provide drayage services on routes involving the Port'" and deemed the district court's purported finding to be "well supported by the record." Pet. App. 34a. The court of appeals therefore concluded that the possibility that the Port would invoke the requirement to deny access to its facilities was "tenuous or remote," and found it not to be preempted on that basis. *Ibid.* (quoting *Rowe*, 552 U.S. at 371).

That factbound determination makes this case a poor vehicle to consider the scope of Section 14501(c). Given the court of appeals' conclusion that the financial-capability requirement is essentially toothless, this would not be an appropriate case to determine whether a municipal port may impose requirements on motor carriers seeking to use its facilities. If a motor carrier is denied access to the Port in the future for failure to satisfy the financial-capability requirement, moreover, it could file a challenge to the provision at that point.

2. Petitioner nevertheless asserts that the decision below conflicts with two lines of authority. But even if petitioner is correct that the court of appeals articulated certain principles that differ from those adopted by other circuits, the ultimate ground for its conclusion that

the financial-capability provision was not preempted did not turn on that difference.

a. Petitioner contends (Pet. 24-26) that this case implicates a division of authority over the meaning of the term "service" in Section 14501(c). Before this Court's decision in *Rowe*, the Third and Ninth Circuits had defined "service" to include only "the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail," while other circuits had defined it more broadly. See *Northwest Airlines, Inc.* v. *Duncan*, 531 U.S. 1058, 1058 (2000) (O'Connor, J., dissenting from denial of certiorari). The government does not agree with that position, and, as petitioner notes, *Rowe* clearly embraced a broader understanding of "service" than the Ninth Circuit. See Pet. 25. It is unclear whether the Ninth Circuit will revisit the issue in light of *Rowe*.[5]

The decision below, however, did not rest on the definition of "service" and therefore does not implicate the alleged division of authority. Indeed, the section of the opinion setting forth the definition of "service" cited *Rowe* for the proposition that the term encompasses a motor carrier's "system for picking up, sorting, and car-

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[5] Petitioner cites *Ginsberg* v. *Northwest, Inc.*, 653 F.3d 1033 (9th Cir. 2011), an ADA case, as reaffirming the pre-*Rowe* understanding of "service," but that opinion was withdrawn after petitioner filed its reply brief and replaced by an opinion that did not articulate the pre-*Rowe* standard. See 695 F.3d 873 (9th Cir. 2012), petition for cert. pending, No. 12-462 (filed Oct. 11, 2012). *Ventress* v. *Japan Airlines*, 603 F.3d 676 (9th Cir. 2010), another ADA case, did not address *Rowe*. The validity of the Ninth Circuit's pre-*Rowe* standard is now before that court, and the government has filed an amicus curiae brief arguing that it was abrogated by *Rowe*. See Gov't C.A. Br. at 24-28, 11-16240 Docket entry No. 22 (Oct. 18, 2011).

rying goods," not only the more limited class of activities listed in the circuit's pre-*Rowe* precedents. Pet. App. 18a. And the court of appeals did not base its ultimate holding on the view that the concession agreements do not "regulate the contractual features of the provision of trucking services," as petitioner suggests. Pet. 26. Rather, it held only that the financial-capability provision would have no impact on trucking services because the Port was unlikely to invoke it to deny access to motor carriers. That limited holding does not conflict with the authority cited by petitioner.

b. Petitioner also maintains (Pet. 20-24) that the decision below implicates a conflict of authority over whether a state law "specifically targeted" at the subject matter of a federal statute can survive an express preemption provision, citing mostly ERISA decisions. But although the government agrees as a general matter with the proposition that such a law cannot survive preemption, the cases petitioner cites did not hold that a provision with *no* effect on the subject matter is preempted. See, *e.g.*, *Branche* v. *Airtran Airways, Inc.*, 342 F.3d 1248, 1258-1259 (11th Cir. 2003) (explaining that a provision that "directly regulates such services or * * * has a significant economic impact on them" is preempted), cert. denied, 540 U.S. 1182 (2004). In any event, in light of the determination by both the courts below that the financial-capability provision is likely to be of little or no practical significance, the court of appeals' ruling on this point does not warrant review.

C. The Decision Below Does Not Conflict With This Court's Decision In *Castle* v. *Hayes Freight Lines, Inc.*

Petitioner's third question presented asserts a conflict between the decision below and *Castle* v. *Hayes*

Freight Lines, Inc., 348 U.S. 61 (1954).[6] There is no conflict.

1. In *Castle*, a trucking company's motor carriers had repeatedly violated Illinois weight restrictions, and under state law, repeated violations could lead to a carrier's suspension from the use of state highways for up to one year. See *Castle*, 348 U.S. at 62-63. The company challenged the suspension provision, and this Court held that it was preempted by the Motor Carrier Act of 1935, ch. 498, 49 Stat. 543, which authorized the Interstate Commerce Commission to license motor carriers to operate in interstate commerce. See 348 U.S. at 63. The Court reasoned that the Act imposed significant procedural obstacles before the Commission could suspend or revoke a carrier's authorization, so "it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate." *Id.* at 63-64. The Court considered "suspension of this common carrier's right to use Illinois highways * * * the equivalent of a partial suspension of its federally granted certificate." *Id.* at 64.

Castle thus stands for the proposition that even where a State seeks to enforce non-preempted requirements on federally licensed motor carriers, the enforcement mechanism chosen by the State may conflict with federal law. The Court acknowledged that Illinois's weight requirement did "not itself conflict with the Federal Act" due to an express provision in the Motor Carrier Act permitting such regulation, but concluded that

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[6] This is the only basis on which petitioner now challenges the maintenance provision of the concession agreements, which the court of appeals found to fall within Section 14501(c)'s safety exception to preemption.

"it would stretch this statutory provision too much to say that it also allowed states to revoke or suspend the right of interstate motor carriers for violation of state highway regulations." *Castle*, 348 U.S. at 64. The decision made clear, however, that States could enforce non-preempted regulations through more "conventional forms of punishment." *Ibid.*

2. Assuming for the sake of this argument based on *Castle* that the relevant provisions of the concession agreements are not preempted by the FAAAA, the Port's enforcement of those provisions would not necessarily run afoul of *Castle*.[7] As noted, the concession agreements have been incorporated into a tariff that punishes infractions through criminal penalties—"conventional forms of punishment." *Castle*, 348 U.S. at 64; see also *Hayes Freight Lines, Inc.* v. *Castle*, 117 N.E.2d 106, 108 (Ill.) (discussing plaintiff's concession that a "schedule of fines" was permissible), aff'd 348 U.S. 61 (1954). Petitioner argues that *Castle* applies because "the Port can enforce a provision of the concession agreements by denying [licensed motor carriers] access to the Port." Pet. 26. But it is not clear that the Port would punish violations of the provisions at issue here through a "total suspension of the carrier's right to use [the Port]," as in *Castle*. 348 U.S. at 62; see 3 C.A. E.R. 488 (Concession Agreement Schedule 4) (setting forth Port remedies for a "Minor Default," not including suspension or revocation).

To be sure, the Port has conditioned access to the facilities on a carrier's registration under the concession

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[7] The government cited *Castle* in its amicus curiae brief before the Ninth Circuit to support the general proposition that "state or local licensing schemes are inconsistent with the FAAAA's deregulation of motor carriers' service." Gov't C.A. Br. 9-10.

agreement (or attainment of a day pass). See Pet. App. 12a. But *Castle* did not hold that a State was required to allow carriers on its highways that refused at the outset to agree to abide by its valid state laws; indeed, the Court noted that the plaintiff was operating under a license from Illinois state authorities and did not suggest that such a licensing scheme was preempted. See 348 U.S. at 62. The problem in *Castle* was not that the State insisted on the carrier's agreement to comply with certain non-preempted regulations prospectively, but that it punished past infractions through a draconian prohibition on the use of state highways, effectively suspending the carrier's federal license. See *id.* at 64. In the event that the Port does punish violations of the provisions at issue here through a suspension or revocation of a carrier's right to use the facilities, the carrier, like the plaintiff in *Castle*, could bring an as-applied challenge.[8]

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[8] The court of appeals distinguished *Castle* on the ground that it involved "all of a State's freeways," whereas this case involves only "access to a single Port." Pet. App. 32a. That distinction is immaterial, however, given the importance of the Port to interstate and international commerce.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-798

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* AIRLINES FOR AMERICA IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* AIRLINES FOR AMERICA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*[1]

Airlines for America (A4A), formerly known as the Air Transport Association of America, Inc., is the trade organization of the principal U.S. airlines. It represents the interests of fourteen airline members and one associate airline member, which together transport more than ninety percent of U.S. airline passenger and cargo traffic. Those members are AirTran Airways; Alaska Airlines, Inc.; American Airlines, Inc.; ASTAR Air Cargo, Inc.; Atlas Air, Inc.; Delta Air Lines, Inc.; Evergreen International Airlines, Inc.; Federal Express Corporation; Hawaiian Airlines, Inc.; JetBlue Airways Corp.; Southwest Airlines Co.; United Continental Holdings, Inc.; UPS Airlines; US Airways, Inc.; and Air Canada, which is an associate member.[2]

The mission of A4A is to foster a business and regulatory environment that ensures safe and secure

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[1] Pursuant to Supreme Court Rule 37, *amicus* states that no counsel for a party authored this brief in whole or in part, and no one other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Further, *amicus* states that counsel of record for all parties received notice at least ten days prior to the due date of *amicus curiae*'s intention to file this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

[2] A4A also has a number of airline-related industry partners and members, a list of which is available at www.airlines.org/Pages/Members.aspx.

air transportation while permitting U.S. airlines to flourish, thus stimulating economic growth locally, nationally, and internationally. As part of that mission, A4A seeks to identify, highlight, and challenge laws and government policies that impose inappropriate regulatory burdens or unfairly impinge on the free operation of the marketplace for the services of its members. Throughout its seventy-five year history, A4A has been actively involved in the development of the law applicable to commercial air transportation by advocating common industry positions on policy and legal issues of interest and importance to its members. A4A has frequently participated as *amicus curiae* before this Court and other courts. In particular, A4A has participated as *amicus curiae* in litigation relating to the preemption provision of the Airline Deregulation Act of 1978 ("ADA"), Pub. L. No. 95-504, § 4(a), 92 Stat. 1705, 1708 (1978) (currently codified, as amended, at 49 U.S.C. § 41713(b)(1)), which has long prevented air carriers from being subject to a complicated patchwork of state regulations by prohibiting states from enacting or enforcing laws or regulations directly or indirectly "related to" an air carrier's prices, routes, or services.[3] This Court has recognized that the preemption provision in the subsequently enacted Federal Aviation Administration

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[3] Contrary to what the Ninth Circuit's opinion says, the ADA is no longer codified at 49 U.S.C. app. § 1305(a)(1) and no longer refers to "rates" rather than "prices." *Cf. Am. Trucking Ass'ns v. City of L.A. ("ATA")*, 660 F.3d 384, 396 n.8 (9th Cir. 2011). In 1994, the ADA was recodified at its current location with technical changes (including the change from "rates" to "prices") that Congress intended to have no substantive effect. *See Am. Airlines v. Wolens*, 513 U.S. 219, 222-23 & n.1 (1995).

Authorization Act of 1994 ("FAAAA"), Pub. L. No. 103-305, Title VI, § 601(b)-(c), 108 Stat. 1569, 1605-06 (1994) (currently codified at 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A)), which is at issue in this case, has the same preemptive effect as the ADA, and cases interpreting the FAAAA also affect the ADA (and vice versa). *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008).

Proper application of ADA preemption, and by extension FAAAA preemption, is of critical importance to A4A's members, which rely on ADA preemption to shield airlines from a complicated patchwork of state regulations by prohibiting states from enacting or enforcing laws or regulations "related to" the prices, routes, or services of an airline. Carriers routinely rely on nationally uniform rules governing interstate transportation by air in structuring their business dealings with a variety of third parties, just as Congress envisioned they would. Uncertainty created by inconsistent judicial rulings regarding the scope of ADA preemption undermines the ability of A4A members to operate efficiently, innovate, plan and make informed decisions about their business relationships. The Ninth Circuit's decision below creates such uncertainty because it conflicts with decisions from both this Court and other circuits. Accordingly, authoritative resolution of those conflicts by this Court is crucial to A4A's members.

BACKGROUND AND INTRODUCTION

Because the preemptive language in the FAAAA is the same as that in the ADA, and cases

interpreting the FAAAA also apply to the ADA, the Ninth Circuit's decision below affects not only motor carriers, but also air carriers such as A4A's airline members because it impacts the interpretation of the ADA preemption provision on which they rely.

Congress passed the ADA in 1978 to release the air transportation industry from intensive regulation, based on its determination that deregulation would best further the goals of "efficiency, innovation, and low prices as well as variety and quality of air transportation services." *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992) (quotation marks and alterations omitted). Congress recognized, however, that the states could easily undo its deregulation efforts by enacting their own regulations governing air carriers. *Id.* With fifty states in the union, plus the District of Columbia and various territories, airlines were potentially subject to more than fifty regulatory schemes, not to mention an array of municipal and local regulations, each with its own obligations and prohibitions. The resulting patchwork of laws would utterly defeat Congress' goal of deregulating air carriers. Congress, unwilling to permit this evisceration of its efforts, resolved the problem by including a broad preemption clause in the ADA. *Id.* at 378-79 ("To ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a preemption provision . . . ."). Subject to certain express exceptions, the ADA preempts any "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier . . . ." 49 U.S.C. § 41713(b)(1).

Congress later recognized that motor and intermodal carriers also needed the benefit of this "deliberately expansive" preemption clause, *Morales*, 504 U.S. at 384, so it extended the same preemption to them through the FAAAA. The FAAAA expressly preempts, in relevant part, any "law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier," 49 U.S.C. § 14501(c)(1), or "air carrier or carrier affiliated with a direct air carrier through common controlling ownership," *id.* § 41713(b)(4)(A) (hereinafter, "intermodal carrier"). Congress made clear its intent that the preemptive effect of these provisions is the same as that of the ADA, and this Court has therefore held that cases interpreting one statute's preemption provision apply with equal force to the preemption provision of the other statute. *See Rowe*, 552 U.S. at 370.

This Court has addressed ADA and FAAAA preemption on three occasions, and each time it has reaffirmed its breadth and expansiveness. In *Morales*, this Court held that the preemptive language used by Congress in the ADA "express[es] a broad preemptive purpose," has a "broad scope" and "expansive sweep," and is both "deliberately expansive" and "conspicuous for its breadth." 504 U.S. at 383-84. Given this starting point, the Court rejected the suggestion that the ADA prevents states only from "actually prescribing rates, routes, or services"; applies only to laws specifically addressed to the airline industry; or preempts only state laws that are inconsistent with federal law. *Id.* at 385-87. Instead, this Court held that the ADA preempts *any* state law having a connection with or reference to an

airline's prices, routes, or services, unless that connection or reference is "too tenuous, remote, or peripheral . . . to have preemptive effect." *Id.* at 384, 390.[4]

Three years later, in *American Airlines v. Wolens*, 513 U.S. 219 (1995), this Court reaffirmed the far-reaching scope of ADA preemption. It held that even state laws of general applicability affecting "non-essential" airline matters—such as frequent flier programs—are sufficiently "related to" air carriers' prices, routes and services as to be preempted by the ADA. *Id.* at 226-28. The Court also held that the ADA prevents states not only from enacting statutes or enforcing state common law in a way affecting an air carrier's prices, routes, or services, but also from enforcing, in breach of contract actions, anything other than the specific terms agreed on by the parties. *Id.* at 232-33 (the ADA "confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement"). In sum, this Court held, states "may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier," whether by statute or common law or equitable contract doctrines. *Id.* at 229 n.5.

Most recently, in 2008, relying on *Morales* and *Wolens*, this Court held that the FAAAA preempts local laws that affect motor carriers' services even

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[4] Although the Court mentioned this outer limit, it "express[ed] no views about where it would be appropriate to draw th[at] line." *Id.* at 390.

indirectly. *Rowe*, 552 U.S. at 372 ("We concede that the regulation here is less 'direct' than it might be, for it tells *shippers* what to choose rather than *carriers* what to do."). The relevant inquiry is the *effect* of the local law, and the FAAAA preempts state regulation, whether direct or indirect, "of the essential details of a motor carrier's system for picking-up, sorting, and carrying goods—essential details of the carriage itself." *Id.* at 373.

Thus, this Court has on every occasion emphasized and affirmed the broad scope of ADA and FAAAA preemption.

The Ninth Circuit's decision undermines this established breadth and expansive scope of FAAAA and ADA preemption, however, in at least two ways. First, the Ninth Circuit read into the FAAAA a broad, non-textual "market-participant" exception to save from preemption certain local requirements that "relate to" carriers' prices, routes or services. The Ninth Circuit applied this non-textual exception to the FAAAA in disregard of relevant decisions from this Court. Second, the Ninth Circuit used a constricted view of both what it means for a local requirement to "relate to" a carrier's prices, routes, or services, and of the term "services." These rulings conflict with this Court's recent decision in *Rowe* and decisions from other circuits. The uncertainty created by these conflicts, and the persistence of the Ninth Circuit's minority view, is particularly problematic given that the primary purpose of ADA and FAAAA preemption is to avoid a non-uniform patchwork of regulations around the country. Review of the Ninth Circuit's decision by this Court is needed

to resolve these conflicts, clarify the scope of ADA and FAAAA preemption, and establish a single, national preemption standard under these acts.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT INAPPROPRIATELY APPLIED A NON-TEXTUAL MARKET-PARTICIPANT EXCEPTION TO THE FAAAA IN DISREGARD OF RELEVANT DECISIONS FROM THIS COURT.

This case warrants review because the Ninth Circuit inappropriately created a broad exception that is nowhere contained in the FAAAA—the market-participant exception—to save from preemption local requirements that "relate to" carriers' prices, routes or services. *Am. Trucking Ass'ns v. City of L.A. ("ATA")*, 660 F.3d 384, 406-07, 409 (9th Cir. 2011). The Ninth Circuit's application of this broad, non-textual exception to the FAAAA, in disregard of relevant decisions from this Court, concerns air carriers because courts may also attempt to apply it to the ADA, notwithstanding that the ADA, unlike the FAAAA, contains an express but limited market-participant exception to preemption.

The Ninth Circuit's decision below marks a continued expansion by lower courts of the contexts in which a market-participant exception is applied. The market-participant doctrine initially arose in a series of dormant Commerce Clause cases. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429, 440 (1980); *S. Cent. Timber Dev. v. Wunnicke*, 467 U.S. 82, 93 (1984) (plurality). Since then, courts, including this

Court, also have applied a market-participant exception in cases involving implied preemption under the National Labor Relations Act ("NLRA"). *See, e.g., Bldg. & Constr. Trades Council of the Metro. Dist. v. Assoc. Bldrs. & Contractors of Mass./R.I.*, (*"Boston Harbor"*), 507 U.S. 218, 226-27 (1993). Some lower courts, particularly the Ninth Circuit, have gone further and created a market-participant exception to statutes, including the FAAAA, that contain express preemption provisions but no market-participant exception. *See, e.g., Assoc. Gen. Contractors of Am. v. Metro. Water Dist.*, 159 F.3d 1178, 1182-85 (9th Cir. 1998) (creating a market-participant exception to ERISA's express preemption provision); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1043 (9th Cir. 2007) (creating a market-participant exception to the Clean Air Act's express preemption provision); *Cardinal Towing & Auto Repair v. City of Bedford*, 180 F.3d 686, 691 (5th Cir. 1999) (creating a market-participant exception to the FAAAA's express preemption provision).[5]

The Ninth Circuit's creation of a market-participant exception to the FAAAA in this case is contrary to relevant decisions from this Court regarding the applicability of the exception. This Court has made clear that a market-participant exception does not apply in all contexts where Congress has acted: "the 'market participant' doctrine reflects the particular concerns underlying

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[5] Prior to this case, however, no court had applied a market-participant exception to the FAAAA outside the limited factual circumstance of the provision of nonconsensual towing services to a municipality. Pet. at 10-11.

the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted." *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 289 (1986). In considering whether a market-participant exception to preemption applies, a court must assess whether there is "*any* express *or implied* indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests," which precludes application of a market-participant exception. *Boston Harbor*, 507 U.S. at 231-32 (emphasis added). As this Court has recently reiterated, "[w]hen a federal law contains an express preemption clause, we focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Commerce of the U.S. v. Whiting*, __ U.S. __, 131 S.Ct. 1968, 1977 (2011).

Here, the Ninth Circuit created a market-participant exception to FAAAA preemption without conducting the necessary inquiry about congressional intent. Specifically, the Ninth Circuit failed to consider whether there is "any express or implied indication by Congress" against application of a market-participant exception to FAAAA preemption. *Boston Harbor*, 507 U.S. at 231-32. In fact, there are several concrete indications against such an exception. To start, there is the plain statutory language. Congress carefully calibrated FAAAA preemption through a number of specific, express exceptions—for state requirements related to motor-vehicle safety, highway route controls and limits, and insurance; the transportation of household goods; non-consensual towing; and the state of Hawaii—yet

it omitted any general market-participant exception like the one applied by the Ninth Circuit. 49 U.S.C. §§ 14501(c)(2)–(5), 41713(b)(4)(B).

Congress knows how to include expressly a market-participant exception when it wants to do so. *See, e.g.*, *id.* § 32919(c) (expressly excepting from preemption state fuel economy standards for automobiles obtained for the state's own use); *id.* § 32304(i) (same for state motor vehicle labeling requirements); 15 U.S.C. § 1476(b) (same for state packaging requirements for household substances obtained for the state's own use); *id.* § 1203(b) (same for state flammability standards for fabric obtained for the state's own use); *see also* Pet. at 30. Congress' omission of such an express market-participant exception from the FAAAA indicates that Congress did not intend for it to apply.[6] *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522-23 (1984) ("Obviously, Congress knew how to draft an exclusion for collective-bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress" did not intend for the exclusion to apply); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").

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[6] Arguably, the FAAAA's exception for state requirements relating to the price of non-consensual towing services, 49 U.S.C. § 14501(c)(2)(C), is a market-participant exception, Pet. at 30. The contrast between that narrow, express exception and the expansive, non-textual market-participant exception created by the Ninth Circuit is striking.

The omission of an express market-participant exception from the FAAAA is even more significant given that Congress specifically *included* such an exception—albeit a narrow one[7]—in the ADA. Section 41713(b)(3) of Title 49 expressly provides that the ADA's preemption provision "does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights." Congress included this express exception when enacting the ADA because it "recognized that airport proprietors—the majority of which are municipalities . . . —were best equipped to handle local problems arising at and around their facilities." *Am. Airlines v. DOT*, 202 F.3d 788, 805 (5th Cir. 2000) (citation omitted).

Congress was undeniably aware of the ADA's preemption provision, and its narrow market-participant exception for state and local airport proprietors, when it enacted the FAAAA. In fact, the stated purpose of the FAAAA was to extend ADA preemption to motor and intermodal carriers, and Congress used the ADA's preemption language in the FAAAA. H.R. Rep. No. 103-677, at 82-85 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1754-60. Yet, Congress failed to include an analogous market-participant exception in the FAAAA. This omission strongly indicates that Congress did not intend for a market-participant exception to apply to

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[7] See discussion, *infra*, at 15.

the FAAAA. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (explaining that if Congress had intended to restrict a statutory section, it would have done so expressly, as it did in another section) (quotation marks and alteration omitted); *United States v. Naftalin*, 441 U.S. 768, 773-74 (1979) (refusing to read language from one provision into parallel provisions because "Congress did not write the statute that way"); *Pac. Operators Offshore, LLP v. Valladolid*, No. 10-507, __ U.S. __, 2012 WL 75045, at *6 (Jan. 11, 2012) ("Our usual practice is to make the . . . inference" that Congress acts intentionally and purposely when it includes a restriction in one section of a statute but omits it in another section).

Finally, there are "express or implied indication[s]" that Congress respects carriers' contracts with third parties and would not want state or local authorities imposing their "public policies or theories" as a precondition to the carriers' fulfillment of those contracts under a market-participant exception. As this Court has previously concluded, Congress, in enacting the ADA, "presuppose[d] the vitality of contracts governing transportation by air carriers." *Wolens*, 513 U.S. at 230. Thus, this Court held on the one hand that private parties may pursue breach of contract actions to enforce "a term" that an airline itself had "stipulated." *Id.* at 232-33. On the other hand, this Court held that the ADA forbids state or local authorities from seeking "to impose

their own public policies or theories of competition or regulation on the operations of an air carrier." *Id.* at 229 n.5. Here, the Ninth Circuit's market-participant exception improperly allows the port authorities to impose their "public policies or theories" on carriers as a precondition to the port access necessary for fulfilling the carriers' drayage contracts with third parties.

The port authorities' attempt to control participation in the drayage services market (a market in which they undisputedly do not participate) through the concession agreements is analogous to state efforts to influence the labor market through restrictions on the receipt or use of state funds. *Chamber of Commerce of the U.S. v. Brown*, 554 U.S. 60, 70-71 (2008); *Gould*, 475 U.S. at 291.[8] This Court correctly has held that such activity—which is "neither specifically tailored to one particular job nor a legitimate response to state procurement constraints or to local economic needs"—is that of a market regulator, and thus is not saved from preemption by a market-participant exception. *Brown*, 554 U.S. at 70 (quotation marks omitted). As this Court has recognized, because "government occupies a unique position of power in our society," it can exercise its proprietary powers in ways that are "tantamount to regulation," and "its conduct, regardless of form, is" therefore "rightly

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[8] It is likewise analogous to Alaska's effort to use its proprietary timber rights to influence timber processing, a market in which Alaska did not participate. *Wunnicke*, 467 U.S. at 95-99; *id.* at 99 ("Instead of merely choosing its own trading partners, the State is attempting to govern the private, separate, economic relationships of its trading partners . . . .").

subject to special restraints." *Gould*, 475 U.S. at 289-90.

The Ninth Circuit's improper application of a non-textual market-participant exception to the FAAAA is an important issue to air carriers. Although the ADA, unlike the FAAAA, does include an express market-participant exception, as discussed above, that exception is narrowly limited to specific proprietary powers and rights related to airports. 49 U.S.C. § 41713(b)(3). Courts have recognized the narrow scope of this exception. *See Am. Airlines*, 202 F.3d at 806 (explaining that "courts have recognized that local proprietors play an 'extremely limited' role in the regulation of aviation," and citing cases). The non-textual market-participant exception created by the Ninth Circuit in this case, however, is broadly expansive. *See* Pet. at 32. Given that cases interpreting the FAAAA also apply to the ADA, and vice versa, the Ninth Circuit's decision could result in courts applying this broad, non-textual market-participant exception to the ADA, notwithstanding the limited, express market-participant exception in the ADA itself. Accordingly, review of this case is warranted to clarify that, for purposes of the ADA and FAAAA, the only applicable market-participant exceptions (like all exceptions to ADA and FAAAA preemption) are those that are expressly found in the statutes themselves.

II. THE NINTH CIRCUIT'S CONSTRICTED INTERPRETATIONS OF "RELATED TO" AND "SERVICES" CONFLICT WITH THIS COURT'S DECISION IN *ROWE* AND DECISIONS OF OTHER CIRCUITS, AND IMPROPERLY NARROW THE REACH OF ADA AND FAAAA PREEMPTION.

This case also warrants review because the Ninth Circuit narrowly interpreted the terms "related to" and "services" in conflict with this Court's *Rowe* decision, thereby improperly restricting the preemptive scope of the ADA and FAAAA. The Ninth Circuit construed "related to" in a manner that blatantly snubs this Court's decisions in *Morales*, *Wolens*, and *Rowe*. The Ninth Circuit also persisted in using a discredited definition of "services," which conflicts with both *Rowe* and decisions from other circuits.

A. "Related to"

The Ninth Circuit inappropriately limited the phrase "related to" in the FAAAA's preemption provision to instances where a state law "binds the . . . carrier to a particular price, route or service." *ATA*, 660 F.3d at 397. This construction turns this Court's *Rowe* decision on its head and improperly narrows the scope of FAAAA and ADA preemption.

In *Rowe*, this Court held that the FAAAA preempted "recipient verification" and "deemed to know" provisions of Maine's tobacco-delivery law because those provisions essentially compelled motor carriers to provide services the carriers would not necessarily provide otherwise. 552 U.S. at 372 ("[T]he effect of the [recipient-verification] regulation

is that carriers will have to offer tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate."); *id.* at 373 ("The [deemed-to-know] provision thus requires the carrier to check each shipment for certain markings and to compare it against the Maine attorney general's list of proscribed shippers. And it thereby directly regulates a significant aspect of the motor carrier's package pickup and delivery service."). Thus, this Court concluded, the two Maine provisions had the "'significant' and adverse 'impact' in respect to the [FAAAA's] ability to achieve its pre-emption-related objectives" that this Court forbade in *Morales*. *Id.* at 371-72. On the facts in *Rowe*, this Court thus made clear that state law cannot be applied to compel an air or motor carrier to provide a service it does not wish to provide.

In this case, the Ninth Circuit, relying on a decision of its own that pre-dates *Rowe*, purported to recognize this principle that an air or motor carrier cannot be compelled to provide a service it does not wish to provide: "In . . . a 'borderline' case, the proper inquiry is whether the provision, directly or indirectly, 'binds the . . . carrier to a particular price, route or service and thereby interferes with competitive market forces within the . . . industry.'" *ATA*, 660 F.3d at 396-97 (quoting *Air Transp. Ass'n of Am. v. City & Cnty. of S.F.*, 266 F.3d 1064, 1072 (9th Cir. 2001)). According to the Ninth Circuit, a "borderline case" is one in which the preemptive effect of a provision of state law "'is only indirect.'" *ATA*, 660 F.3d at 397 (quoting *Rowe*, 552 U.S. at 370). Thus, under the Ninth Circuit's decision below, provisions of state law affecting air or motor carriers

indirectly are preempted *only* when they bind carriers to particular prices, routes, or services. *ATA*, 660 F.3d at 397.

Although the Ninth Circuit's decision is based on the idea, shared by *Rowe*, that carriers cannot be bound or compelled to provide particular services, the conclusion itself is directly contrary to *Rowe*. *Rowe* did not hold that provisions of state law affecting air or motor carriers indirectly are preempted *only* when they bind carriers to particular prices, routes, or services. Instead, this Court's preemption holding rested overtly on the Court's observations that, because laws with less direct effect are preempted, laws with a binding effect like those in *Rowe* are necessarily preempted. Specifically, this Court observed that *Morales* found preemption where the generally applicable, state consumer-protection laws at issue there affected only "advertising *about* carrier rates and services," rather than actually binding carriers to any particular prices, routes, or services. *Rowe*, 552 U.S. at 372 (emphasis in original). Similarly, this Court observed that *Wolens* found preemption where the generally applicable, state consumer-protection laws at issue there affected only "the details of an air carrier's frequent flyer program, a program that primarily *promotes* carriage," rather than actually binding carriers to any particular prices, routes, or services. *Id.* at 373 (emphasis in original). In effect, this Court's *Rowe* decision is based, in relevant part, on the Court's stated awareness that, because state laws with only indirect effects are preempted, a state law actually binding carriers to a particular service *a fortiori* is preempted.

That is, *Rowe* very clearly articulates a floor on preemption, rather than a ceiling.

The Ninth Circuit's decision in this case, however, reverses this aspect of *Rowe* by making "service-binding" a prerequisite to preemption whenever the effects of state laws are indirect. The Ninth Circuit held that the financial capability requirement was not preempted solely because the port authorities had not yet enforced it and, thus, it did not bind carriers to a particular price, route or service. *ATA*, 660 F.3d at 404. This approach cannot be squared with *Rowe*'s reading of *Morales* and *Wolens*. Moreover, it flies in the face of the fundamental point made by this Court in *Morales* that states should not be able to regulate indirectly what they cannot regulate directly. *Morales*, 504 U.S. at 386. Thus, the petition for certiorari should be granted.

B. "Services"

The Ninth Circuit, in its decision below, also continued its use of a discredited, constricted definition of "services" that conflicts with this Court's recent decision in *Rowe* and decisions from other circuits, and inappropriately restricts the preemptive scope of the ADA and FAAAA. *ATA*, 660 F.3d at 396.

As explained in the Petition, prior to *Rowe*, the circuits were split regarding the definition of the term "services," as used in the ADA and FAAAA. Pet. at 24-25. The Ninth Circuit had adopted a narrow view of "services," holding that it is limited to things such as "the frequency and scheduling of

transportation, and to the selection of markets to or from which transportation is provided," and excludes things such as "the pushing of beverage carts, keeping the aisles clear of stumbling blocks, the safe handling and storage of luggage, assistance to passengers in need, or like functions." *Charas v. Trans World Airlines*, 160 F.3d 1259, 1266 (9th Cir. 1998) (en banc).

As numerous courts and the United States itself have recognized, however, this Court implicitly overruled the Ninth Circuit's narrow definition of "services" in *Rowe*. *See, e.g.*, Statement of Interest by the United States at 13, *Nat'l Fed'n of the Blind v. United Airlines*, No. C-10-4816 (N.D. Cal. Apr. 8, 2011), ECF No. 45 ("[T]he Supreme Court's later holding in *Rowe* created a conflict with the Ninth Circuit's narrow definition of 'service.'"); Pet. at 25 (citing cases). In *Rowe*, this Court held that the term "services" in the FAAAA includes all the "essential details" of a carrier's provision of transportation, including the carrier's method for "picking-up, sorting, and carrying goods." 552 U.S. at 373, 376. By concluding that Maine's law related to carriers' "service" even though it did not affect the frequency and scheduling of transportation or the selection of markets to or from which transportation was provided, this Court necessarily has rejected the Ninth Circuit's narrow definition of "services."

Nevertheless, the Ninth Circuit has stubbornly maintained its narrow definition of "services" after *Rowe*, including in this case. *ATA*, 660 F.3d at 396 ("The terms 'rates, routes, and services' were 'used by Congress in the public utility sense; that is, service

refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided.'"); *see also* Pet. at 25-26 (citing cases). Despite the multiple decisions to the contrary, the Ninth Circuit has never even bothered trying to explain how its pinched definition of "services" can be squared with *Rowe*. Instead, it has chosen simply to ignore direct and binding precedent from this Court addressing the term "services" under the FAAAA.

Accordingly, review by this Court is warranted even more now than it was when three Justices of this Court dissented from the denial of certiorari in *Northwest Airlines v. Duncan*, 531 U.S. 1058 (2000). The Ninth Circuit's definition of "services" now conflicts with decisions from at least four other circuits and binding precedent from this Court. *See Hickox-Huffman v. US Airways,* 788 F. Supp. 2d 1036, 1039 (N.D. Cal. 2011) ("There is an unresolved split among the Courts of Appeal with respect to what constitutes 'service' for purposes of ADA preemption."). And resolution of this issue is highly important to air carriers, as Justices O'Connor, Rehnquist and Thomas recognized in *Duncan*. 531 U.S. at 1058 ("Resolution of this question would provide needed certainty to airline companies.") The applicable definition of "service" is often dispositive as to whether ADA or FAAAA preemption applies. For example, the Maine tobacco laws at issue in *Rowe* would not have been preempted under the Ninth Circuit's constrained definition of "services" because they regulated neither the frequency and scheduling of transportation, nor the selection of markets to or from which transportation is provided. Likewise, the

New York "passenger bill of rights" at issue in *Air Transport Association of America v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008), which required airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays, would not have been preempted under the Ninth Circuit's narrow "services" definition, which excludes the provision of food, drinks and other amenities. *Charas*, 160 F.3d at 1266.

Air carriers and courts should be able to rely with confidence on this Court's pronouncements regarding what "services" means in the FAAAA and, by extension, the ADA. The Ninth Circuit's disregard of *Rowe*, however, calls such reliance into question and results in differing scopes of ADA and FAAAA preemption around the country—exactly the type of patchwork that Congress sought to avoid with the enactment of the ADA and FAAAA. *See Duncan*, 531 U.S. at 1058 ("Because airline companies operate across state lines, the divergent pre-emption rules formulated by the Courts of Appeals currently operate to expose the airlines to inconsistent state regulations."). Thus, the petition for certiorari should be granted.

CONCLUSION

A4A respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Petitioners,

v.

CITY OF LOS ANGELES, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND HARBOR TRUCKING ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Is there a generalized "market participant" exception to the Supremacy Clause of the United States Constitution?

2. Is a municipal government a "market participant" when it purchases no goods or services and otherwise has no participation other than the management of public property?

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IDENTITY AND INTEREST OF AMICI CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is the public interest law arm of the Claremont Institute. The mission of the Claremont Institute and the Center are to restore the principles of the American Founding to their rightful and preeminent authority in our national life. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of significance addressing constitutional structure, including *American Electric Power Co. v. Connecticut*, __ U.S. __, 131 S.Ct. 2527 (2011); *Bond v. United States*, __ U.S. __, 131 S.Ct. 2355 (2011); *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); and *United States v. Morrison*, 529 U.S. 598 (2000). The Center is vitally interested in the constitutional structure of government that defines a specific role for the federal government. Although the Center is most often active in those cases where the federal government has overstepped

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

the bounds of its role, federalist structure also requires that state and local governments be prohibited from exceeding their power under the federal structure. The Constitution unquestionably assigns regulation of commerce between states and with foreign nations to Congress and establishes that congressional enactments under that power are the "supreme law of the land."

Harbor Trucking Association is a nonprofit 501(c)(6) organization that focuses on best practices in the drayage industry. Its members include Licensed Motor Carriers that move cargo from the ports, including the Port of Los Angeles, as well as cargo owners that use the drayage system. The HTA is one of the leading industry groups in the inter-modal transportation business. Its members are directly impacted by any and all tariff changes, policy decisions, and rate increases that take place at both the Port of Los Angeles and Port of Long Beach.

Many of the Licensed Motor Carriers that belong to HTA work with independent contractor truckers to move the cargo from the port. These Licensed Motor Carriers take on the obligation of obtaining the necessary regulatory permits from the United States Department of Transportation for a truck to operate. The Licensed Carriers will also take responsibility for the administrative requirements of working with the Port, the Department of Transportation, the California Highway Patrol, and other regulators. The Licensed Carriers may purchase the trucks to move the cargo and lease them to the independent contractors. This allows the owner-operators to continue to work in a legal environment of increasing regulation including rules

that require ever more expensive pollution control technology.

Neither the Licensed Motor Carriers nor the owner-operator truckers that work with them do business with the Port of Los Angeles. Instead, the Carriers contract directly with shipping companies (or the purchasers of the cargo) to move cargo from the port to customers or to the next point of transportation in the cargo's journey. The Port has no need to hire the members of HTA because the Port has no cargo to transport.

HTA members generally work with owner-operators — truck drivers that own their own equipment. The vast majority of drayage companies working at the Port use this business model in which low barriers to entry create intense competition among the carriers for business. Small businesses are allowed to flourish in this environment. It is an environment where, until the regulations at issue were enacted, competitive market forces could be counted on to produce lower rates and better service. *See Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 371 (2008).

In HTA's experience, the truck owner-operators favor this arrangement over an employer-employee model. The owner-operator model allows the truckers more freedom to set their own schedule and also allows them to make more money than employee-drivers. Bill Sharpsteen, *The Docks* 179 (University of California Press, 2011). Without the owner-operator model, most of the smaller Licensed Carriers would not be able to compete in this market.

As set forth in John E. Husing, et al., *San Pedro Bay Ports Clean Air Action Plan, Economic Analysis, Proposed Clean Truck Program* (Sept. 7, 2007) (Husing)[2], a purpose of the regulations at issue is to put the members of HTA out of business in order to attract national trucking lines to take over drayage services at the port. To accomplish this purpose, the port is working to end the entrepreneurial competition that is the hallmark of the drayage industry at the port.

SUMMARY OF ARGUMENT

The Port of Los Angeles is a local government agency that manages the public trust for navigation over tidelands in Los Angeles. The Port is financed by leasing space shipping companies bringing goods to the United States from around the world. The Port has no business relationships, however, with the trucking companies providing drayage services to the shippers. Nonetheless, the court below ruled that the Port was a mere market participant, and thus regulations imposed on these trucking companies in order to advance environmental and social goals were not subject to the express preemption provisions of a Congressional enactment. Review is necessary in this case to examine this radical expansion of the "market participant" doctrine and to examine whether the doctrine yields a general exception to the Supremacy Clause of the United States Constitution.

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[2] The Husing Report was commissioned by the Ports of Los Angeles and Long Beach to study the impact of the Ports' Clean Truck Program. The report is posted on the Port of Los Angeles' web site at http://www.portoflosangeles.org/ctp/CTP_Full_Report_Sept72007.pdf.

REASONS FOR GRANTING REVIEW

I. REVIEW IS NECESSARY TO SETTLE THE IMPORTANT QUESTION OF WHETHER A STATE MAY AVOID THE PREEMPTIVE EFFECT OF A CONGRESSIONAL ENACTMENT WHEN IT SEEKS TO IMPROVE ITS OWN ECONOMIC POSITION

The Port of Los Angeles is on tidelands of the State of California. *American Trucking Associations. Inc. v. City of Los Angeles*, 559 F.3d 1046, 1049 (9th Cir. 2009) (*ATA I*). These tidelands have been granted to the City of Los Angeles, but the city only holds the property in trust for the benefit of the people of the State of California. *Id.* California gained title to its tidelands at statehood, "not in its proprietary capacity but as trustee for the public." *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 521 (Cal. 1980). Under the public trust doctrine, tidelands are held in trust for the public for navigation, commerce, and other public purposes. *Id.*; *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 435 (1892). The grant of the tidelands to the City of Los Angeles for the port was subject to this trust. *See Zack's, Inc. v. Sausalito*, 165 Cal. App. 4th 1163, 1176-77 (2008); *Illinois Cent. R.R.*, 146 U.S. at 453-54. Indeed, the State of California has no power to alienate the tidelands of the state free of the public trust for navigation and commerce. *See Ward v. Mulford*, 32 Cal. 365, 372 (Cal. 1867); *People v. California Fish Co.*, 166 Cal. 576, 588 (Cal. 1913); *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 484 (Cal. 1970).

This Court noted in 1873 that the state's sovereignty over this land was subject "to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States." *Weber v. Bd. of Harbor Comm'rs*, 85 U.S. 57, 65-66 (1873). This public trust ownership of tidelands has existed since the founding of this nation.

> [W]hen the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the constitution to the general government.

Martin v. Lessee of Waddell, 41 U.S. 367, 410 (1842).

This Court emphasized these restrictions on public trust properties in *Illinois Cent. R.R.*. At issue in that case was the ownership of land beneath Lake Michigan that the railway contended it owned by reason of a grant from the state. The Court conceded that, under the equal footing doctrine, Illinois gained title to the lands under navigable waters in the state upon admission to the state. 146 U.S. at 434-35. That title, however, was not the same as title to upland property. "It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Id.* at 452. Even if the state transfers title, it still has a trust responsibility. "The trust devolving upon the state

for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property." *Id.* at 453.

There is no dispute that when Los Angeles was granted this property for construction of the port, it was a grant that was subject to the public trust. Los Angeles is required to hold this property for the benefit of the public for navigation and commerce, among other purposes. These public trust purposes are at the heart of the use of the tidelands for a commercial port. That fact establishes not only that the port is complying with its duties under the public trust, but also that when the City of Los Angeles uses the granted tidelands for a port—for navigation and commerce—it is engaged in a quintessential government function dating from the time of the revolution.

In this case, the city, as well as the state, stands as the trustee for the public to ensure that these tidelands are used in a manner consistent with the public trust. While the city can allow private parties to undertake activities consistent with the trust, there can be no doubt that when government does so it acts in the role of government. Indeed, it cannot act otherwise under the public trust doctrine. The state and the city hold this property for the public purposes of navigation and commerce. In this role, this city is no more a private actor than when it assesses private property for taxes, hires police and firefighters, or takes any other action pursuant to police power to act for the public safety, health, or welfare. *See Golden State Transit Corp. v. City of Los*

Angeles, 475 U.S. 608, 617-18 (1986); *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 95-96 (1984).

Amici do not dispute that the Port collects revenue from the shipping companies that use its facilities. As the court below noted, the Port is not supported by tax revenue. Instead it relies on fees and leases to finance its activities. *American Trucking Associations, Inc. v. City of Los Angeles*, 660 F.3d 384, 391 (9th Cir. 2011) (*ATA II*). At the same time, however, there is no doubt that the Port is a governmental entity. As noted above, the Port manages the tidelands as part of California's public trust for navigation and commerce. The Port is run by a Harbor Commission that is appointed by the Mayor of Los Angeles and confirmed by the Los Angeles City Council. The Port maintains its own police department and port police officers are "peace officers" with the same powers and duties as any other law enforcement peace officer in the State of California. Cal. Penal Code §830.1. The port issues bonds, the interest on which is exempt from state and federal income tax - the same as other public entities.

The regulations at issue in this case are targeted at the Licensed Motor Carriers providing drayage services to the shipping companies. The Port does not use the services of these companies and indeed concedes that it has "no direct hand in the daily movement of cargo." Financial Polices for the Harbor Department of the City of Los Angeles, April 2011, at 11.[3] None of the regulations at issue concern

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[3] The document is posted on the Port's web site at http://www.portoflosangeles.org/pdf/POLA_Financial_Policies.pdf

the procurement of goods or services for the Port. Indeed, the "'principal motivating factor'" for these regulations was to achieve specific environmental goals. *ATA I*, 559 F.3d at 1049.

Notwithstanding the clear lack of interest by the Port of Los Angeles of entering into any type of business arrangements with the drayage trucking companies, the Ninth Circuit found that the Port's regulation of these companies falls within the "market participant doctrine," thus shielding the regulations from federal preemption. The Ninth Circuit reached this conclusion based on its finding that expansion of Port facilities was "stymied by legal opposition from community and environmental groups." *ATA II*, 660 F.3d at 390. Thus, the Port's Clean Truck Program was meant to address some of these concerns and remove political objections to port expansion. Because this regulation of Licensed Motor Carriers served the economic goals of the Port, the Ninth Circuit ruled that those regulations were "essentially proprietary." *Id.* at 399.

The lower court ruled that "the Port directly participates in the market as manager of Port facilities." *Id.* at 400. The court then sought to limit this sweeping proclamation to only those situations where the government agency is "self-sustaining" by reason of the fees charged to other businesses for use of the property. *Id.* at 401. This distinction means that management of city streets may not qualify as a market participant activity in the Ninth Circuit, but management of a toll road, government-owned parking structure, fee-support rapid transit system, or even a fee-supported public park.

Such a conclusion stands in contrast to this Court's ruling in *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008). In that case this Court rejected the notion that a state's spending power might escape preemption where a direct regulation (what this Court termed exercise of a "police power") would not. 554 U.S. at 70. In *Chamber of Commerce*, California sought to prohibit all employers receiving state funds (or, importantly for this case, using state property) from spending money to influence employee decisions on union organizing. *Id.* at 63. This Court refused to characterize California as a proprietor in this circumstance, even though the law was one that governed the expenditure of state funds. Because the regulation was neither "specially tailored to one specific job" nor related to "efficient procurement of goods or services" the state action was one of general regulation. *Id.* at 70. The fact that California sought to regulate the use of state funds and property in *Chamber of Commerce* did not convert the action from a regulation into a proprietary act. The Ninth Circuit's decision departs from this line of reasoning in a significant fashion. Mere management of public property where some fees are collected is now sufficient to convert any regulation into proprietary action free of the command of the Supremacy Clause that congressional enactments are the supreme law of the land.

This is a breathtaking expansion of the market participant doctrine — all the more so since it offers an exception to preemption without any reference to Congressional intent. This Court should grant review to determine whether the market participant

doctrine should be expanded in such a radical manner.

II. REVIEW IS NECESSARY TO SETTLE THE IMPORTANT QUESTION OF WHETHER THERE IS A GENERAL MARKET PARTICIPANT EXCEPTION TO THE SUPREMACY CLAUSE

Federal preemption of state law proceeds from the power granted in Article VI, Clause 2. Whatever compelling interest a state may have in a particular regulatory scheme, that scheme must give way in the face of a conflicting congressional enactment. *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 108 (1992); *Gibbons v. Ogden*, 22 U.S. 1, 210-11 (1824).

The question of preemption is one of congressional intent. *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 231 (1993); *Metropolitan Life, Ins. Co. v. Massachusetts*, 471 U.S. 724, 738 (1985). Thus, in the face of an express preemption provision, a state's economic interests are not the starting point for the analysis. This Court noted as much in its decision in *Wisconsin Department of Industry v. Gould, Inc.*, 475 U.S. 282, 290 (1986). Since *Gould*, however, the question of whether a state regulation escapes the preemptive force of the Supremacy Clause when it involves a "spending" power has become confused.

The market participant doctrine does not exist as a free-standing, all purpose exception to preemption. "[T]he 'market participant' doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding

the necessary extent of state power in areas where Congress has acted. *Gould*, 472 U.S. at 289. What types of state regulation the Commerce Clause would permit is "an entirely different question" from what states may do in the face of Congress' decision to preempt state law. *Id.* at 290. Nonetheless, lower court decisions since *Gould* tend to mix market participant cases decided under the Dormant Commerce Clause with cases involving preemption, never mentioning the nature of the "entirely different question" raised by those two concepts.

Since the decision in *Gould* this Court has continued to use the term "market participant," but has focused on whether state action "'was specifically tailored to one particular job'" rather than a more general regulation. *Chamber of Commerce*, 554 U.S. at 70. More importantly, this Court has examined the state action to determine if it was the type of action Congress intended to preempt. *See Building & Construction Trades Council*, 507 U.S. at 231; *Golden State Transit*, 475 U.S. at 618. Thus, in *Golden State Transit*, this Court rejected the notion that a "traditional municipal function" was any more exempt from preemption than the state spending decision in *Gould*. It was not the nature of the municipal regulation, but rather whether it interfered with scheme set in place by Congress.

The state agency contract at issue in *Building & Construction Trades* was upheld – but not simply because it involved economic activity of the state. Instead the state agency was characterized as a "proprietor" – it was a party to the contractual relationships under review. 507 U.S. at 232. The question was whether contract provision was one

that was preempted by the National Labor Relations Act. The mere fact that a state agency was a party to the contract did not convert the contract into a state regulation subject to preemption. In order to uphold "Congress' intended free play of economic forces" state actors need to exercise the same freedom of contract under the federal law as private actors. *Id.* The project labor agreement was upheld because it was the type of agreement permitted under the NLRA. *Id.* at 231-32.

The federal law at issue in this action, the Federal Aviation Authorization Act, expressly preempts any "local law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. §14501(c)(1). No exception to this command appears in the law for regulations enacted to serve economic or environmental goals of the local entity. Congress did permit states to continue to enact safety regulations and vehicle insurance requirements. 49 U.S.C. §14501(c)(2)(A). No similar exception was granted for economic purposes, however.

This Court has described the "overarching goal" of these provisions as assuring that "transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces.'" *Rowe*, 552 U.S. at 371 (*quoting Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992)). The regulations of the Port of Los Angeles have a different goal. Competition is seen as the problem rather than the goal. Husing at 22. The Port regulations seek to increase costs for Licensed Motor Carriers and independent owner-operator truckers in the hopes of

driving these small businesses out of the market. *Id.* at 24. The Port believes that once this occurs, shippers will be forced to pay higher rates for drayage trucking and this will in turn attract national trucking firms with the economic resources necessary to satisfy other goals of the Port. *Id.*

Review is necessary to determine mere management of public property on which it earns a fee is sufficient to permit the Port of Los Angeles to pursue goals for the transportation of goods in international and interstate commerce that are diametrically opposed to the goals set by Congress.

CONCLUSION

For the foregoing reasons, amici urge the Court to grant the petition for writ of certiorari.

DATED: January, 2012.

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[*]

Amici, the Chamber of Commerce of the United States of America ("Chamber") and the National Industrial Transportation League ("NIT League"), file this brief to address a mistaken trend in Ninth Circuit case law. Contrary to this Court's precedent and the opinions of sister circuits, the Ninth Circuit engrafted into the express-preemption provisions of the Federal Aviation Administration Authorization Act ("FAAAA") a broad "market participant" exception that Congress did not see fit to create. Countering this development is the focus of this *amicus* brief, but both the Chamber and the NIT League also endorse the position of Petitioner the American Trucking Associations ("ATA") that (i) the Port of Los Angeles's "Concession Plans" at issue in this case impose requirements that are "related to a price, route, or service of any motor carrier" for the purposes of preemption under Section 14501(c)(1); and that (ii) the Port may not block federally licensed motor carriers from accessing the Port without violating *Castle* v. *Hayes Freight Lines*, 348 U.S. 61 (1954). *Amici* also agree with Petitioners' analysis as to why the safety exception in the FAAAA is inapplicable. See Pet. 27-28.

The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three

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[*] After timely notification, the parties consented to the filing of this brief, and their consent letters are on file with the Clerk. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business. More specifically, the Chamber has filed briefs in several of this Court's key market participant doctrine cases, including *Chamber of Commerce* v. *Brown*, 554 U.S. 60 (2008); *Building & Constr. Trades Council* v. *Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993) ("*Boston Harbor*"); and *Wisconsin Dep't of Indus., Labor & Human Relations* v. *Gould, Inc.*, 475 U.S. 282 (1986).

Founded in 1907, the NIT League is a national association that represents approximately 600 member companies that tender goods to carriers for transportation in interstate and international commerce, or that arrange or perform transportation services. The NIT League's membership includes large multinational and national corporations as well as small and medium-sized companies. The NIT League's shipper members span a multitude of industries, such as retailing, automotive, chemicals, computers, and electronics and use all modes of transportation including trucking. Many NIT League members are importers or exporters that depend on our Nation's seaports, including Los Angeles, for efficient and timely shipping. The NIT League has previously participated as an *amicus* in significant port and maritime litigation. See *Norfolk S. Ry. Co.* v. *Kirby*, 543 U.S. 14 (2004); *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998).

In this case, by decreeing the terms for contracts between private shippers and truck operators and ostracizing dissenting truckers from the Port, the Port of Los Angeles has engaged in regulation of significant concern to *amici* and the members they represent — regulation that the FAAAA preempts for the reasons explained below.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves "Concession Plans" that the Port of Los Angeles has adopted to limit the ability of shippers to contract with truckers transporting ("draying") shipping containers to or from the Port. The Port insists that the Plans establish voluntary contracts despite the fact that the Plans (1) are incorporated into a municipal ordinance backed by criminal sanction; (2) form part of a published tariff enforceable under the federal Shipping Act of 1984; and (3) have the primary purpose of "ameliorat[ing] adverse environmental effects" by "creating incentives for concessionaires to use clean and efficient trucks." Pet. App. 226a.

The Concession Plans have the force of law and are thus preempted by the Federal Aviation Administration Authorization Act ("FAAAA"). It is well-settled that, when a federal law contains an express preemption clause, this Court "focus[es] on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). The plain text of the FAAAA preempts contrary state provisions that have the "force and effect of law." 49 U.S.C. §§ 14501(c)(1), 14506(a). And this Court has

established that "the phrase 'having the force and effect of law' is most naturally read to refer to binding standards of conduct that operate irrespective of any private agreement." *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 229 n.5 (1995) (some internal quotation marks and modifications omitted).

The Ninth Circuit opinion below disregarded these bedrock propositions (and the plain text of the statute) to hold that the Port's adoption of the Concession Plans was not subject to preemption under the FAAAA because the Port was supposedly acting as a market participant in implementing the Plans. Drawing on cases from the dormant Commerce Clause context, the Ninth Circuit held in relevant respect that (i) the Port could mandate that trucks have a plan for using off-street parking facilities *outside of the Port*, see Pet. App. 38a, and (ii) mandate the use of placards on trucks, see *id.* at 44a, because the Port was acting in a proprietary, not regulatory capacity. Specifically, the Ninth Circuit determined that, "[p]rior to the enactment of concession agreements, community members complained that drayage trucks regularly parked in surrounding neighborhoods, posing safety and health risks. The Port believed that off-street parking would mitigate drayage trucks' negative impacts and increase the community goodwill necessary to facilitate Port expansion." *Id.* at 40a. And the Ninth Circuit further reasoned that the "placard provision is proprietary in nature" and therefore not preempted, because it was adopted "in response to community concerns" and "invites community participation and increases goodwill." *Id.* at 46a. In the Ninth Circuit's words, "[e]nhancing goodwill in the community surrounding the Port is an im-

portant and, indeed, objectively reasonable business interest." *Id.* at 40a.

Amici respectfully submit that this brand of analysis cannot be the touchstone of FAAAA preemption. To the contrary, it is often the case that disregarding a federal statute's preemptive scope will promote local goodwill. Yet the whole point of preemption doctrine is to ensure that the Nation's public policy goals prevail over local concerns when Congress has explicitly spoken on a subject within its authority.

Indeed, the FAAAA's preemption provisions were enacted to deregulate an encrusted federal regulatory regime as well as to eliminate the patchwork of burdensome state trucking regulations that had grown up alongside that now-defunct body of federal regulation. Congress's purpose was to ensure that state governments would not undo federal deregulation with re-regulation of their own. See *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008). Thus, the FAAAA expressly provides that the critical inquiry is whether the state rules have the "force and effect of law." The Concession Plans at stake here undoubtedly do. The Plans are an out-and-out sovereign licensing scheme for regulating trucking markets weakly masquerading as mutual contracts. Such a licensing scheme with the "force and effect of law" does not comport with the text of the FAAAA. To the extent, moreover, that there was any doubt about the Plans' regulatory nature, those doubts are dispelled by the sheer fact that the Plans are embodied in the Port's Tariff 4, which gives it the force and effect of law. See 46 U.S.C. § 40501(f).

The implications of this case are deep and cut across the entire field of federal regulation of both in-

ternational and interstate commerce. Even if this case did not involve specific facts that are themselves remarkable — the imposition of a licensing regime by the municipal government that hosts the largest port in the Nation denying access to truck operators unless they submit to regulations establishing how drayage trucks can operate — this case would still be of immense significance. The off-street parking and placard requirements, seen in the narrowest light, "may be . . . the obnoxious thing in its mildest and least repulsive form," but as this Court has elsewhere remarked, such "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Stern* v. *Marshall*, 131 S. Ct. 2594, 2620 (2011) (quoting *Boyd* v. *United States*, 116 U.S. 616, 635 (1886)).

If the court below is allowed to declare as market participation general categories of regulation in the environmental and safety areas — and if the Port is allowed to issue edicts vaguely designed to ensure good relations with its private neighbors — then not only will the express-preemption provisions in the FAAAA (and other federal statutes) fall prey to ready circumvention, but all boundaries confining the market participant doctrine to rational limits will be erased.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Erroneously Held That The FAAAA Does Not Preempt The Concession Plans Because They Are Saved By A Judicially Created Market Participant Exception.

It is well-settled that, when a federal law contains an express preemption clause, this Court "focus[es] on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Easterwood*, 507 U.S. at 664. The panel opinion departs from that teaching and engrafts upon the FAAAA a market-participant exception absent from the plain language of the statute.

A. The FAAAA Expressly Preempts State Provisions That Have The Force And Effect Of Law.

Both of the provisions of the FAAAA that are relevant here expressly preempt contrary provisions that have the "force and effect of law." The FAAAA unambiguously provides that "a State [or] political subdivision of a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Relatedly, the FAAAA also prevents States and their political subdivisions from enacting or enforcing any "provision having the force and effect of law that requires a motor carrier . . . to display any form of identification on or in a commercial motor vehicle . . . other than forms of identification required by the Secretary of Transportation." *Id.* § 14506(a).

In *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995), this Court interpreted the meaning of the phrase "force and effect of law" in the context of a similar preemption provision contained in the Airline Deregulation Act of 1978 (ADA). In *Wolens*, this Court explained that "the phrase 'having the force and effect of law' is most naturally read to refer to binding standards of conduct that operate irrespective of any private agreement." *Id.* at 229 n.5 (some internal quotation marks and modifications omitted; see also *id.* at 240 (O'Connor, J., dissenting in part) ("action to invoke the State's coercive power . . . by means of a generally applicable law" is action "having the force and effect of law").

As a result, under *Wolens*, "privately ordered obligations . . . do not amount to a State's 'enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law'" within the meaning of the ADA. *Id.* at 228-229. By contrast, where a state enacts "binding standards of conduct that operate irrespective of any private agreement," such provisions clearly have the "force and effect of law" and are accordingly preempted.

There can be little dispute that the Concession Plans have the "force and effect of law." While nominally described as calling for "contracts" or "agreements," the Concession Plans are essentially a state licensing scheme restricting access to the Port in furtherance of regulatory-style goals. Several aspects of the Plans demonstrate their regulatory nature.

First, as part of its approval of the Concession Plans, the Port issued a broad prohibition providing that, effective October 1, 2008, "no Terminal Operator shall permit access into Terminal in the Port of Los

Angeles to any Drayage Truck unless such Drayage Truck is registered under a Concession or a Day pass from the Port of Los Angeles." Pet. App. 12a. The Port thus set as a background rule a prohibition on access to the Port, with a requirement that drayers receive permits to obtain such access.

Second, it is undisputed that the Port does not, pre- or post-Concession Plan, participate in transactions between shippers and drayers carrying container traffic into and out of the Port. See, *e.g.*, Pet. App. 6a, 43a (Ninth Circuit decision after trial), 221a-222a (initial Ninth Circuit interlocutory appeal) 255a, 257a, 259a (initial District Court preliminary injunction decision).

This is not a case, in other words, of the Port establishing the contract terms for an agreement between itself and the providers of drayage services. Instead, the Port here requires that drayers accept certain provisions for the right to do business with shippers that use the Port to import and export cargo.

Third, reinforcing that they have the "force and effect of law" under the FAAAA, the Concession Plans are expressly incorporated into statutory law in two significant ways. As an initial matter, they are embodied in a local municipal ordinance backed by the threat of criminal prosecution. See Pet. 31; see also Pet. App. 83a n.5.

No less importantly, the Concession Plans are incorporated into the federal Shipping Act of 1984, and are therefore "enforceable by an appropriate court as an implied contract without proof of actual knowledge of its provisions," 46 U.S.C. § 40501(f).

Here, the Concession Plans are part of the Port's "Tariff No. 4." Pet. App. 83a (trial findings); see *id.* at 183a, 203a, 212a, 241a. Tariff No. 4 plainly provides that "no Terminal Operator shall permit access into any Terminal in the Port of Los Angeles to any Drayage Truck unless such Drayage Truck is registered under a Concession or a Temporary Access Permit" and that the "terms and conditions for the Concession are set forth in the Port of Los Angeles Concession Agreement between the Port of Los Angeles and the Licensed Motor Carrier." Port of Los Angeles, Tariff 4, Section 20, Clean Air Action Plan — General Rules and Regulations, Item No. 2040, *available at* http://www.portoflosangeles.org/Tariff/SEC20.pdf (last visited Jan. 23, 2012). Tariff 4 was made publicly available via posting on the Internet. *Ibid.*

As part of the Port's tariff, the Concession Plans are subject to review by the Federal Maritime Commission (FMC). See, *e.g.*, *New York Shipping Ass'n* v. *FMC*, 854 F.2d 1338 (D.C. Cir. 1988) (affirming Federal Maritime Commission assertion of jurisdiction over tariffs); *Plaquemines Port, Harbor & Terminal Dist.* v. *FMC*, 838 F.2d 536 (D.C. Cir. 1988) (holding that the FMC had jurisdiction over port offering essential services and controlling access to private facilities). Indeed, the Plan was in fact voluntarily submitted by the Port to the FMC for review. See Agreement 201196 (submitted Sept. 30, 2008), *available at* www2.fmc.gov/agreement_lib/201196-000.pdf (last visited Jan. 23, 2012).

Hence, pursuant to the Shipping Act, marine terminal operator agreements like the Concession Plans unavoidably carry the force of law, because they are

"enforceable by an appropriate court as an implied contract *without proof of actual knowledge of its provisions.*" 46 U.S.C. § 40501(f) (emphasis added). Such provisions are deemed "contracts" only by operation of a legal fiction, but in actuality are fully enforceable under federal law once adopted by a port and made publicly available. Hence, the Port's submission to the FMC of the Concession Plans, along with the Port's deliberate decision to make the tariff publicly available and consequently trigger Section 40501(f), are actions flat-out inconsistent with the Port's litigating position that it is acting as a market participant.

Fourth, it is undisputed that: (i) the Port earns all or much of its revenue based on the amount of container traffic transiting the Port; (ii) the Concession Plans will drive up drayage contract pricing, increasing shipping costs; and (iii) the Plans will cause at least a three percent diversion of container traffic to other ports. See Pet. App. 29a (Ninth Circuit appeal after trial); 89a (Finding of Fact ¶ 80); 216a ("'additional components of the Concession agreements,' [include] 'creating a 'market characterized by the presence of fewer, generally larger and more stable' licensed motor carriers. Los Angeles Board Resolution 6522."); see also *id.* at 89a (Finding of Fact ¶ 79). The whole point of the Concession Plans was to drive up the costs for drayage services, thereby reducing demand and/or incentivizing a shift to more environmentally friendly, newer-generation heavy-duty diesel trucks. It is axiomatic that reducing supply leads to higher prices. See, *e.g.*, *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 777 (1999) ("price will ... rise in order to limit demand to the reduced supply"). It follows that the Port's purpose was not to promote

business development at the Port, but rather to further the City's environmental policies.

Taken together, such legal sanctions and requirements demonstrate that the Concession Plans have the "force and effect of law." Indeed, the Ninth Circuit did not seriously suggest to the contrary. As a result, the "scheme is tantamount to regulation." *Gould*, 475 U.S. at 287 (emphasis added). At the end of the day, just as this Court explained in *Chamber of Commerce* v. *Brown*, 554 U.S. 60 (2008):

> It is beyond dispute that California enacted AB 1889 in its capacity as a regulator rather than a market participant. AB 1889 is neither "*specifically tailored* to one particular job" nor a "legitimate response to state procurement constraints or to local economic needs." *Gould*, 475 U.S., at 291. As the statute's preamble candidly acknowledges, the legislative purpose is not the efficient procurement of goods and services, but the furtherance of a labor policy. See 2000 Cal. Stats. ch. 872, § 1.

Id. at 70 (emphasis added).

B. The Ninth Circuit's Importation Of The Dormant Commerce Clause's Market Participant Doctrine Into The FAAAA Cannot Be Reconciled With The Statute's Plain Text and Exceeds the Doctrine's Boundaries In Any Event.

Rather than relying on the FAAAA's plain text and this Court's precedents construing comparable language, the Ninth Circuit read into the FAAAA a "market participant" doctrine based on jurisprudence

under the dormant Commerce Clause. That conclusion is incorrect for several reasons.

First, and as explained above, any importation of market participant doctrine into the FAAAA cannot be reconciled with the statute's text. Under the relevant FAAAA provisions, *all* provisions that have the "force and effect of law" are preempted regardless of whether the State purports to act in its regulatory or proprietary capacity. There is no warrant in the statute for drawing a distinction based on the intentions behind the enactment of a particular law.

The pivot point for determining the extent of preemption in a statute with an express-preemption provision is the intent of Congress, not the constitutional objectives of dormant Commerce Clause doctrine. The dormant Commerce Clause establishes background rules of constitutional protection for our "national 'common market.'" *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977). Once Congress acts, however, the default rules of the dormant Commerce Clause, which includes a narrowly tailored market participant doctrine, are subject to change. "[T]he 'market participant' doctrine reflects the particular concerns underlying the Commerce Clause, *not any general notion regarding the necessary extent of state power in areas where Congress has acted*." *Gould*, 475 U.S. at 289 (emphasis added).

That distinction is particularly important here because the objective of the FAAAA is not simply to prevent States and localities from fracturing the national common market in the transportation of goods — a concern that overlaps with the dormant Commerce Clause — but *to deregulate* that market. See

Rowe, 552 U.S. at 368 (describing deregulatory and preemptive purposes of the Motor Carrier Act of 1980 and the FAAAA); see also *id.* at 370-71 (observing that the Court determined in *Morales* v. *TWA, Inc.*, 504 U.S. 374, 390 (1992), that "pre-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives"). The scope of preemption under the FAAAA, in other words, is not the same as the scope of unconstitutional state/local government conduct under the dormant Commerce Clause.

In this regard, this case differs from this Court's holding in *Boston Harbor*. In *Boston Harbor*, this Court recognized a market-participant exception under the judicially created doctrines of implied preemption under the National Labor Relations Act (NLRA). See 507 U.S. at 231 (State can manage its "own property [by] pursu[ing] its purely proprietary interest . . . where analogous private conduct would be permitted."). The Court upheld the City of Boston's contractual requirements from challenge because it was designed "to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost," and for that reason, the City was "acting as [a] proprietor rather than regulator." *Id.* at 228. Critically, the NLRA contains no express-preemption provision like that in FAAAA Section 14501(c)(1). Where an act contains an express preemption provision, as here, the scope of preemption must mirror the scope of the provision. See *Easterwood*, 507 U.S. at 664.

Second, the structure of the FAAAA supports this interpretation. The FAAAA's preemption provisions themselves contain a series of exceptions to their

scope. For example, section 14501(c)(2) lists a series of "matters not covered" by the preemptive scope of section 14501(c)(1), including "the safety regulatory authority of a State with respect to motor vehicles [etc.]" 49 U.S.C. § 14501(c)(2). The same is true of section 14506. Under that provision, several express "[e]xception[s]" to the prohibition against requiring display of identification are listed, including exceptions permitting a State to continue to require a display of credentials under the International Registration Plan, the International Fuel Tax Agreement, or a "State law regarding motor vehicle license plates or other displays that the Secretary determines are appropriate." *Id.* § 14506(b)(1)-(3). Where such exceptions are expressly provided, it is particularly inappropriate to imply others. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Third, the straightforward reading of the FAAAA's express-preemption provision is bolstered by the fact that other statutes contain explicit "market participant"-style language. For example, in enacting the materially identical preemption provision in the ADA, Congress provided expressly for a proprietary exception for municipally owned airports. See 49 U.S.C. § 41713(b)(3). See also 15 U.S.C. § 2075(b) (allowing a federal, state, or local government to "establish[] or continu[e] in effect a safety requirement applicable to a consumer product for its own use" under certain circumstances); cf. 49 U.S.C. § 30103(b)(1) (allowing federal, state, or local governments to "prescribe a standard for a motor vehicle or motor equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard"). The existence of these provisions amply demonstrates

that, where Congress wants to include a market participant exception in a statute, it knows how to do it. It did not do so here.

Fourth, the market participant doctrine — as conceived by the Ninth Circuit — is extraordinarily malleable. Indeed, the very facts of this case demonstrate how a State could mask its public-policy-driven actions as actions taken in its "proprietary capacity."

As the first Ninth Circuit panel explained, the Concession Plans were trying to solve a perceived market failure — classic regulatory action. The record in the case readily demonstrates that a "significant purpose behind the Concession agreements was purely environmental." Pet. App. 226a. The Plans "sought to ameliorate [] adverse environmental effects by forcing a direct contractual relationship upon the motor carriers, by mandating vehicle maintenance requirements, and by enhancing motor carrier efficiency while creating incentives for concessionaires to use clean and efficient trucks." *Id.* And "[a] mere reading of some of the stated purposes of the Los Angeles Board, for example, underscores an extensive attempt to reshape and control the economics of the drayage industry in one of the largest ports in the nation." *Id.* at 225a-226a; see also *id.* at 153a n.2 (district court opinion agreeing that "enjoining the implementation of the Concession agreements will stop cold the clean up of port trucks") (internal quotation marks omitted).

The Port's principal defense at the outset of these proceedings was that it had "plenary" sovereign power over tidelands and hence its actions were immune from preemption. See Pet. App. 250a. The district court repeatedly rejected this argument, including

after a full trial. See *id.* at 105a, 112a-13a. But the key point is that the Port's theory that it could exercise exclusive sovereignty over port lands is quite different from the Ninth Circuit's theory that the Port was simply wielding power over property in the same way an ordinary private citizen or corporation would.

Indeed, the Port's intent was clearly to tame the market. The Port even commissioned "expert testimony" that "confirmed that the economics of an independent owner-operator based drayage system creates perverse incentives for independent owner-operators to skimp on maintenance." *Id.* at 126a. That expert conclusion, however, is directly contrary to the conclusion that Congress reached in enacting the FAAAA as a deregulatory statute designed to preserve the ordinary functioning of the private market. See *Rowe*, 552 U.S. at 368.

Interference with private transactions in this fashion is a kind of genetic marker for sovereign conduct and not mere market participation. Here, "the State interfered with the *natural functioning* of the interstate market either through prohibition or through burdensome regulation." *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976) (emphasis added). Simply put, there is no reason to graft into the FAAAA an atextual market participant exception that permits a State to regulate transportation in the guise of acting in its proprietary capacity.

Fifth and finally, the Ninth Circuit's opinion not only incorporated dormant Commerce Clause jurisprudence into the FAAAA, but expanded on that jurisprudence. "The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a

participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market." *South-Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 97 (1984) (plurality). This Court has repeatedly held that to claim the protections of the doctrine, the governmental unit in question must not be pursuing policy aims but instead must be engaging in unalloyed proprietary activity. Under the doctrine, a government is "managing its own property [by] pursu[ing] its *purely* proprietary interest . . . where analogous private conduct would be permitted." *Boston Harbor*, 507 U.S. at 231 (emphasis added). The analysis reduces to "a single inquiry: whether the challenged program constitute[s] *direct* [S]tate participation in the market." *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 435 n.7 (1980) (internal quotation marks omitted). See also generally *Boston Harbor*, 507 at 227-32.

Applying these principles, the Fifth Circuit has held that mere ownership of a facility does not make a government entity a participant in a market operating on that facility's premises. See *Smith* v. *Dep't of Agric.*, 630 F.2d 1081 (5th Cir. 1980). In *Smith*, the Fifth Circuit invalidated rules adopted by Georgia's Department of Agriculture that gave non-residents inferior sales locations in a farmers' market owned and operated by the State. *Id.* at 1082. The Fifth Circuit rejected the State's argument that it was acting as a market participant. The court noted that no arm of the State "produce[d] the goods to be sold at the market" or "engage[d] in the actual buying or selling of those goods." *Id.* at 1083. Instead, the State had "simply provided a suitable marketplace for the buying and selling of privately owned goods." *Ibid.*

Here, the Port's regulations have the same effect as the invalidated regulation in *Smith*, and in fact go further by interposing a state-established and state-run licensing regime on the private agreements of shippers and drayers at the largest Port in the Nation.

The Ninth Circuit sought to get around these limitations on the market participant doctrine by relying on this Court's decision in *Alexandria Scrap*. See Pet. App. 24a ("The Supreme Court has applied the market participant doctrine to a case *not* involving 'procurement' of goods . . . [i]n *Hughes* v. *Alexandria Scrap Corp.*") (emphasis added). The Ninth Circuit appeared to suggest that the State of Maryland was not acting in a purchasing capacity in *Alexandria Scrap*. But this is directly contrary to how the Court described Maryland's program, which resulted in the purchase of wrecked hulks, albeit for the purpose of ridding the State of such inoperable vehicles. "[U]ntil today the Court has not been asked to hold that the *entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce* creates a burden upon that commerce if the State restricts *its trade* to its own citizens or businesses within the State." *Alexandria Scrap*, 426 U.S. at 808 (emphasis added). It was the dissent in *Alexandria Scrap* that argued that it could not "agree with the Court that this case is solely to be analyzed in terms of Maryland's 'purchase' of items of interstate commerce . . . ." *Id.* at 819 (Brennan, J., dissenting). *Alexandria Scrap* cannot support the Ninth Circuit's expansion of the market participant doctrine.

Accordingly, the Ninth Circuit erred in two significant respects: by importing the dormant Commerce Clause's market participant doctrine into the FAAA in the first place, and then by giving that doctrine a broader reading than this Court has done in the dormant Commerce Clause context.

II. The Questions Presented Are Significant And Recurring.

The logic and reasoning of the Ninth Circuit's opinion promise to have dramatic consequences for the functioning of the Port of Los Angeles, the interpretation and integrity of the FAAAA, the role of market-participant analysis in preemption doctrine (if any), and the broader jurisprudence regarding federal statutes preempting state provisions that have the "force and effect of law."

First and foremost, this Court's intervention is warranted for the simple reason that this case arises out of a dispute over licensing at the Port of Los Angeles, which "handles more shipping container and cargo volume than any other port in the country." Pet. App. 6a. The Port "generates 919,000 regional jobs and $39.1 billion in annual wages and tax revenues." Port of Los Angeles website, *available at* http://www.portoflosangeles.org/idx_history.asp (last visited Jan. 23, 2012). If earning community good will suffices to place Port actions in the market participant category, it is easy for the Port to shield many forms of intrusive regulation through ostensible "contracts" with those wishing to enter its grounds. Before the Port may impose a licensing regime upon drayers — assertedly in its proprietary capacity — it is appropriate for this Court to determine whether the FAAAA says otherwise.

Second, this Court's intervention is warranted because the Ninth Circuit's opinion dramatically narrows the scope of FAAAA preemption. The Ninth Circuit reasoned that, because the State created the marketplace and owned the Port, it could set restrictions on motor carriers contrary to federal law. That conclusion has broad ramifications. For example, the State of California owns many of its highways and freeways. By logical extension, California could impose a licensing scheme of any dimension on motor carriers or even individual drivers that use those roadways, just as it has for motor carriers in the Port.

The Ninth Circuit recognized this flaw in its reasoning, but struggled to get around it. The court reasoned that, "[u]nlike a ban on using all of a State's freeways, a limitation on access to a single Port does not prohibit motor carriers from participating in transport [of] interstate goods to and from that State' or eliminate connecting links to points in other states." Pet. App. 32a (internal quotation marks omitted). That assertion is doubly mistaken. First, as a factual matter, a restriction on motor carriers' use of the largest port in the Nation and the gateway to Asian trade cannot be swept aside as permissible because it does not injure motor carriers as much as a ban on freeway use. Second, as a legal matter, the Ninth Circuit's opinion converts the FAAAA's simple instruction that state provisions with the "force and effect of law" are preempted into an impossible-to-apply sliding-scale determination of whether any particular intrusion by the State is "too much." Having departed from the statutory text, the opinion below leaves only a free-floating policy inquiry in its place.

Third, this Court's intervention is warranted because the Ninth Circuit's opinion threatens to cause ripple effects in the interpretation of other preemption provisions that contain the same "force and effect of law" language as the FAAAA. Preemption formulations of this nature are especially common in the transportation area. See 49 U.S.C. § 508 ("No State or political subdivision thereof may enact, [etc.] any law (including any regulation, standard, or other provision having the force and effect of law) that prohibits, penalizes, or imposes liability for furnishing or using safety performance records in accordance with regulations issued by the Secretary . . . ."); 49 U.S.C. § 13902(b)(4) ("No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, [etc.] having the force and effect of law relating to the provision of pickup and delivery of express packages, newspapers, or mail in a commercial zone if the shipment has and or will have a prior or subsequent movement by bus in intrastate commerce . . ."); 49 U.S.C. § 41713(b)(4) ("a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, [etc.] having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle"); 49 U.S.C. § 44703(j)(2) ("No State or political subdivision thereof may enact, [etc.] any law (including any regulation, standard, or other provision having the force and effect of law) that prohibits, penalizes, or imposes liability for furnishing or using records in accordance with subsection (h) or (i)."); RESPA Reg. X, 24 C.F.R. § 3500.13 (providing that

"[S]tate laws that are inconsistent with [the Real Estate Settlement Procedures Act] or this part are preempted," and that the term "law" as used in the section "includes regulations and any enactment which has the force and effect of law").

Thus, even leaving to one side the important effects that the Ninth Circuit's holding will have on port commerce, trucking operations, and the FAAAA, the opinion below has the potential to sweep more broadly and affect the interpretation of other statutes that contain comparable text. Even more significantly, to the extent the Ninth Circuit opinion is taken as a valid interpretation of the market participant doctrine generally, it has the prospect to broaden that doctrine past its established constitutional stopping point.

CONCLUSION

For these reasons and those stated in the petition for writ of certiorari, this Court should grant the writ.

Respectfully submitted,

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JANUARY 23, 2012

AMICUS CURIAE BRIEF

No. 11-798

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Petitioners,

v.

THE CITY OF LOS ANGELES, THE HARBOR DEPARTMENT OF THE CITY OF LOS ANGELES, THE BOARD OF HARBOR COMMISSIONERS OF THE CITY OF LOS ANGELES,
Respondents,

and

NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, COALITION FOR CLEAN AIR, INC.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF AMERICAN TRUCKING ASSOCIATIONS, INC.'S, PETITION FOR A WRIT OF CERTIORARI

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IDENTITY AND INTEREST OF *AMICUS CURIAE* OWNER OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

The Owner-Operator Independent Drivers Association, Inc. ("OOIDA"), is a trade association made up of independent, small business, and professional truck operators, many of whom serve the Port of Los Angeles (the "Port"), and are, therefore, subject to the Port's Concession Agreement at issue in this litigation.[1] OOIDA is a not-for-profit corporation incorporated in 1973 under the laws of the State of Missouri, with its principal place of business in Grain Valley, Missouri. OOIDA is the largest international trade association representing the interests of independent owner-operators, small-business motor carriers and professional drivers. The 150,000 members of OOIDA are professional drivers and small-business men and women located in all 50 states and Canada. One-truck motor carriers represent nearly half the total number of active motor carriers operating in the United States while approximately 96 percent of active motor carriers operate 20 or fewer trucks. OOIDA filed a brief as *amicus curiae* in support of Petitioner American Trucking Associations, Inc., ("ATA") in this action before the U.S. Court of Appeals for the 9th Circuit.

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[1] Under Supreme Court Rule 37.6, no party's counsel authored this brief in whole or in part. No party, party's counsel, or person – other than the *amicus curiae* – contributed money intended to fund preparing or submitting this brief. The parties received notice of *amicus curiae* intent at least ten days in advance of filing, and all parties consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

OOIDA submits this brief as *amicus curiae* to describe how long-haul interstate truck operators are affected by the Port of Los Angeles' Concession Agreement. The ATA's petition describes the local drayage truck operators who require daily entry into the port – the segment of the motor carrier industry targeted by the Concession Agreement. By contrast, many OOIDA members are from a different segment of the trucking industry: long-haul interstate truck operators who require less frequent or occasional access to the Port.

The Port of L.A.'s Concession Agreement imposes a greater burden on long-haul interstate drivers than it does upon local drayage operators in proportion to the frequency each type of carrier requires access to the Port (local drayage companies can amortize the costs of the Concession Agreement over more entries to the Port). Additionally, the application of the Port's Concession Agreement to long-haul truckers demonstrates the breadth of the marketplace the Port claims to be operating in and the extent to which the Ports' requirements affect the prices, routes and services of motor carriers operating in interstate commerce in violation of 49 U.S.C. §14501(c)(1). Furthermore, despite the number of years since the Court decided *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954), the federal government has continuously maintained exclusive authority to revoke or suspend an interstate motor carrier's federal operating authority. The effect of the Concession Agreement's requirements on interstate long-haul truck operators underscores the importance of the issues raised in the ATA's Petition for a Writ of Certiorari.

ARGUMENT

I. THE BREADTH OF THE MOTOR CARRIER INDUSTRY AFFECTED BY THE CONCESSION AGREEMENT

The Port of Los Angeles Concession Agreement affects many segments of the motor carrier industry. OOIDA members serve the Port of L.A. in a variety of ways. Some OOIDA members perform the traditional drayage of containers to and from the Port and warehouses and rail heads located within 100 miles of the Port in the Los Angeles basin. This is the type of operation that is the focus of the ATA's Petition.

But the Concession Agreement is not limited in its application to these local short-haul container movements. The Port's definition of "drayage truck" under the Concession Agreement is a class 7 (or larger) vehicle that transgresses port property:

> "Drayage Truck" means any in-use On-Road Vehicle with a Gross Vehicle Weight Rating greater than 26,000 that pulls a trailer or chassis used for transporting cargo[...]operating on or transgressing through Port Property for the purpose of loading, unloading or transporting cargo, empty containers or chassis that originated from or is destined for Port Property.

PORT OF LOS ANGELES – TARIFF NO. 4, Item No. 2000.[2]

This definition embraces many interstate truck operators, including OOIDA members, who haul goods into the Port that originate from locations

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[2] *See* http://www.portoflosangeles.org/Tariff/SEC20.pdf (Last accessed January 19, 2012).

throughout North America (outside of the L.A. Basin and outside of California). For example, an owner-operator may haul fresh or frozen meat on refrigerated trailers from the beef producing regions in the U.S. to the Port. The reverse is also true: OOIDA members may also be sent into the Port to pick-up goods destined for locations throughout North America.

Other non-drayage truck operators, that nonetheless fall under the Port's definition of a "Drayage Truck," include those who enter the port to deliver and pick-up general freight; truck operators who operate dump-trucks hauling various bulk commodities (asphalt or fill); truck operators who haul fuel or chemicals in tankers; and truck operators who operate flat-bed trucks or specialized equipment hauling containers loaded on their own conveyances (as opposed to an intermodal chassis) or haul heavy-construction equipment being imported or exported. OOIDA members also deliver goods intended to aid port infrastructure projects.

The Port of Los Angeles Concession Program has an adverse impact on OOIDA members for each of these types of non-drayage and long-haul interstate operations. Were the Court to permit the Port to maintain these Concession Agreement requirements, it would be an invitation for other Ports and other localities to begin creating a patchwork quilt of rules and ordinances imposed upon interstate truck operators. Such a development would defeat the explicit purpose of the preemption provision in 49 U.S.C. §14501(c)(1).

II. THE EFFECT OF THE CONCESSION AGREEMENT ON MOTOR CARRIER PRICES, ROUTES, AND SERVICES UNDER 49 U.S.C. §14501(c)(1)

The Concession Agreement clearly affects the prices, routes and services of interstate long-haul motor carriers as prohibited under Section 14501(c)(1). Long-haul motor carriers who wish to make themselves available to take the occasional load to the Port of L.A. must weigh the cost of complying with the Concession Agreement against the potential economic benefit of taking on such business. To most interstate motor carriers, the Concession Agreement is a heavy financial burden that outweighs the benefits of accepting freight bound to or from the Port. It would be virtually impossible for such motor carriers to justify creating dedicated fleets of trucks and employee drivers to comply with the Concession Agreement in order to specifically attract occasional business to the Port of L.A.

The only alternative under the Concession Agreement is the Port's Temporary Access Permit – an amendment to the Port's Tariffs that the Port established as part of its Clean Air Action Plan. For motor carriers who serve the port less frequently, the Temporary Access Permit allows Port access without the need to enter the Concession Agreement. To obtain a Temporary Access Permit a driver must purchase a $100 RFID device and pay $30 per "Temporary Access Permit trip." *See* Port of Los Angeles web-page entitled "Temporary Access (Daily)

Permits"[3] and Port of Los Angeles Tariff No. 4, Section 2040.[4]

An operator is limited to purchasing 24 Temporary Access Permits in a year. The Temporary Access Permit is only available to trucks registered in the California Air Resources Board Drayage Truck Registry (ARB DTR). PORT OF LOS ANGELES – TARIFF NO. 4, Section 2041.[5]

In reaction to the burdens of the Concession Agreement, interstate motor carriers who did not qualified as concessionaires, but who wished to keep their business bringing freight to the Port, began to bring their loads to a point outside of the port facilities to transfer their load to a qualified truck operator who would then drag the trailer onto the port facility at a cost of $150 per transaction. This "dray-off" transaction clearly affected the price and routes of such carriers who attempted to maintain the same service to the Port for their customers. But now the Port of Los Angeles has even foreclosed the dray-off option to interstate carriers with an amendment to their regulations in mid December 2010.[6]

For an interstate motor carrier to maintain its occasional service to the ports it would have to raise the price of that service to account for the burdens of the Concession Agreement. For carriers who are

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[3] *See* http://www.portoflosangeles.org/ctp/ctp_temp.asp (Last accessed January 19, 2012).

[4] *See* http://www.portoflosangeles.org/Tariff/SEC20.pdf (Last accessed January 19, 2012).

[5] *See* http://www.portoflosangeles.org/Tariff/SEC20.pdf (Last accessed January 19, 2012).

[6] *Id.*

unable to raise the price of that service, they would be forced to cease providing that service. Under either scenario, the Concession Agreement violates the preemption requirement of Section 14501(c)(1) and raises the cost of shipping goods through the Port of L.A. It is important for the Supreme Court to take this issue and clarify the meaning and reach of the terms "price, routes, and services" under the statute to ensure its uniform application across the country.

III. THE MARKET PARTICIPANT DOCTRINE

A. The Finding of a Market Participant Doctrine Exception Requires More Than Just an Analysis of the State's Motivations

The Port's Market Participant argument is largely limited to a review of the Ports' motives and purposes for implementing the Concession Agreement – not the function of its requirements in the marketplace. Several Circuits have held, however, that "[f]ederal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment." *Engine Manufacturers Assoc. v. South Coast Air Quality District*, 498 F.3d 1031, 1046 (9th Cir. 2007); *quoting N. Ill. Chapter of Assoc. Builders & Contractors, Inc., v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005) (emphasis in original). As this Court stated, "In this kind of case there is 'a single inquiry: whether the challenged 'program constituted direct state participation in the market.'" *White v. Massachusetts Council of Consl. Employers, Inc.*, 460 U.S. 204 (1983) *quoting Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980).

The Courts have traditionally viewed the Market Participant Doctrine by reviewing whether the action impedes free private trade in the marketplace or whether the state is acting within the marketplace. To the extent that the Concession Agreement impedes the marketplace of interstate long-haul truck operators, the Port's definition of the marketplace in which it participates is boundless. Should the court find that a market participation exemption exists, it would be important for the Court to clarify how the relevant marketplace should be defined and how a state's permissible participation in that marketplace should be defined, evaluated, and limited.

B. The Port Clearly Involves Itself in Areas Occupied by Federal Regulation

At a minimum, it would be important for the Court to make clear that a state may not claim a marketplace exemption for ordinances it imposes that are already the subject of federal regulation, and therefore, clearly not within the realm of proprietary marketplace decisions.

For example, one requirement of the Concession Agreement pertains to the maintenance of equipment brought into the Port. However, the equipment used by motor carriers in interstate commerce is already subject to extensive rules mandated by Congress and implemented by FMCSA. *See* 49 C.F.R. Part 393. Federal statutes and rules also cover drayage equipment typically used in local port areas. Section 4118 of SAFETEA-LU; Pub. L. 109-59, 119 Stat. 1144, at 1729, August 10, 2005, codified at 49 U.S.C. §31151. Those rules place primary responsibility for maintenance and upkeep on its owners, the intermodal equipment providers (typically ocean carriers). *See* 73

F.R. 76793, "Requirements for Intermodal Equipment Providers and for Motor Carriers and Drivers Operating Intermodal Equipment; Final Rule," published December 17, 2008.

Another requirement of the Concession Agreement is that the motor carrier must use employee drivers rather than independent contractors. The Port's stated purposed of this requirement is to ensure that equipment used at the port is properly maintained. But all pertinent federal motor carrier safety regulations place the responsibility on motor carriers for the inspection, maintenance and safety of the trucking equipment regardless of their use of employee drivers or independent contractors. 49 C.F.R. §§390-399; *see* §390.5 (Definition of "Employee" includes independent contractor when operating a commercial motor vehicle). Whether or not a motor carrier uses independent contractors or employee drivers, they have the same legal responsibilities for insurance. 49 U.S.C. §13906(a). Likewise, both employee drivers and independent contractors must comply with the same safety rules and regulations. 49 C.F.R. §§390-399; *see also* 49 C.F.R. §390.11 (requiring motor carriers to comply with all driver rules).

These rules demonstrate that several of the Port's requirements under the Concession Agreement regulate areas that are fully occupied by the federal regulation of interstate motor carriers. These motor carriers are concerned about the burden of complying with two authorities on the same regulatory matter. The Court should clarify this issue so that that more states and localities do not take the Port's lead and create their own unique rules in areas already occupied by federal law, under the guise of marketplace participation.

IV. THE FEDERAL REGULATORY SCHEME SUPPORTS AFFIRMATION OF THE SUPREME COURT'S DECISION IN *CASTLE*

Despite the number of years since the Court decided *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954) and changes to the regulation of the trucking industry in the interim, the federal government has rigorously maintained and controlled its sole authority to grant, deny, revoke, or suspend a motor carrier's authority to operate in interstate commerce. Only in the most narrow of circumstances has the federal government given the states the ability to temporarily and partially suspend a motor carrier's right to operate in interstate commerce. This conclusion is further bolstered by more recent Supreme Court jurisprudence.

Under 49 U.S.C. §13902(a)(1), FMCSA is authorized to issue motor carrier operating authority only if it finds that the applicant is, *inter alia*, willing and able to comply with motor carrier safety statutes, any safety regulations promulgated by FMCSA, safety fitness requirements established by FMCSA under Section 31144, minimum financial responsibility requirements established under Sections 13906 and 31139, and the duties of employers and employees under Section 31135.[7] Section 13902(a)(4) mandates that the Secretary "shall withhold registration" if he determines that a registrant "does not meet, or is not able to meet" any of the aforementioned requirements.

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[7] A motor carrier must also be willing and able to comply with regulations referred to in Section 13902(a)(1)(A), the scope of which was left open to further interpretation by FMCSA in *Peter Pan Bus Lines v. FMCSA*, 471 F.3d 1350, 1354-55 (D.C. Cir. 2006).

In *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), this Court addressed FMCSA's authority under Section 13902(a)(1) holding that the Agency had "no discretion" under this provision (*Id.* at 770) to prevent entry of Mexican trucks operated by motor carriers that satisfied the conditions in this section. *Id.* at 767. By necessary implication, FMCSA would also have no discretion under Section 13902(a)(4), but to deny registration (operating authority) to a motor carrier who "does not meet, or is unable to meet the requirements in Section 13902(a)(1)." Not only does the federal government have exclusive authority and limited discretion to grant or deny operating authority to a motor carrier, but it has strictly defined when and how such authority may be temporarily or partially revoked.

Once a motor carrier has been granted federal authority to operate in interstate commerce, FMCSA provides for its revocation or temporary suspension only after a thorough federal administrative process by which the agency determines the carrier has committed a pattern of non-compliance with certain critical and acute safety regulations. *See* 49 C.F.R. Part 386.

At the roadside, FMCSA has promulgated specific language for the partial and temporary revocation of that authority – the limited circumstance in which a driver or equipment may be placed out of service on the roadside until specific conditions are remedied. These include equipment defects (49 C.F.R. §396.9), violations of the driver Hours of Service and logbook rules (49 C.F.R. §395.13(b)(1) and (2)); and alcohol use (49 C.F.R. §392.5(c)). The Port's Concession Agreement does not fall under any of this authority. No other federal statute or rule defines any other

circumstance or gives authority to any state or locality to revoke or suspend a properly qualified motor carrier from operating in interstate commerce. OOIDA urges the Court to, affirm *Castle* by recognizing the federal governments' ongoing exclusive authority, and the defined limitations on that authority, to grant or revoke interstate motor carrier operating authority.

CONCLUSION

OOIDA encourages the Court to grant the ATA's Petition for a Writ of Certiorari in order to bring clarity to the laws that apply to interstate truck operators and the port authorities who seek to exert greater control over them. The Port of Los Angeles' actions have affected a greater population of motor carriers than local drayage operations alone. OOIDA's long-haul truck operators are not just concerned that they will be effectively shut out of the Port of L.A., but believe that if the Port's Concession Agreement is permitted to stand, other ports and localities will follow suit, and that a patchwork quilt of rules and regulations will arise in direct conflict with the purpose of the preemption provision under 49 U.S.C. §14501(c)(1).

Respectfully submitted,

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January 23, 2012

JOINT APPENDIX

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 11-798

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed December 22, 2011
Certiorari Granted January 11, 2013

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ITEMS PREVIOUSLY REPRODUCED

In accordance with Supreme Court Rule 26.1, the following items have been omitted in printing this joint appendix because they appear on the following pages of the Appendix to Petition for a Writ of Certiorari filed on December 22, 2011, by Petitioners in Case No. 11-798.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 08-04920 CAS

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Plaintiff,

v.

THE CITY OF LOS ANGELES, ET AL.,
Defendants.

RELEVANT DOCKET ENTRIES

Date	#	Docket Text
07/28/08	1	COMPLAINT against Defendants The Board of Harbor Commissioners of the City of Los Angeles, The City of Long Beach, The Harbor Department of the City of Long Beach, The Board of Harbor Commissioner of the City of Long Beach, The City of Los Angeles, The Harbor Department of the City of Los Angeles. (Filing fee $350 PAID.). filed by Plaintiff American Trucking Associations, Inc. (et)(ds). (Entered: 07/28/2008)
07/30/08	13	NOTICE OF MOTION AND MOTION for Preliminary Injunction re: on Counts I And II of Plaintiffs Complaint filed by plaintiff

		American Trucking Associations, Inc. Motion set for hearing on 8/25/2008 at 10:00 AM before Judge Christina A. Snyder. (Attachments: # 1 Proposed Order Granting Preliminary Injunction) (McNatt, Christopher) (Entered: 07/30/2008)
07/31/08	20	NOTICE OF MOTION AND MOTION to Intervene filed by Proposed Intervenor Defendants Natural Resources Defense Council, Sierra Club, Coalition For Clean Air Inc. Motion set for hearing on 8/25/2008 at 10:00 AM before Judge Christina A. Snyder. (Attachments: # 1 Declaration of David Pettit in Support of Motion to Intervene, # 2 Declaration of Tom Politeo in Support of Motion to Intervene, # 3 Declaration of Martin Schlageter in Support of Motion to Intervene, # 4 Proposed Order, # 5 Proposed Answer) (Pettit, David) (Entered: 07/31/2008)
08/20/08	53	Opposition re: MOTION for Preliminary Injunction re: on Counts I And II of Plaintiffs Complaint 13 filed by Defendants The City of Long Beach, The City of Los Angeles. (Delgadillo, Bryant) (Entered: 08/20/2008)
08/20/08	67	MEMORANDUM in Opposition to MOTION for Preliminary Injunction

		re: on Counts I And II of Plaintiffs Complaint 13 filed by Intervenor Defendants Natural Resources Defense Council, Sierra Club, Coalition For Clean Air Inc. (Attachments: # 1 Declaration of David Pettit, # 2 Declaration of Shankar Prasad, # 3 Declaration of Diane Bailey, # 4 Declaration of Edwin Cruz, # 5 Declaration of Felipe Lopez, # 6 Declaration of Bob Kelly)(Pettit, David) (Entered: 08/20/2008)
08/22/08	70	NOTICE Of Tariff Amendment To The Clean Truck Program filed by Defendants The City of Los Angeles. (Delgadillo, Bryant) (Entered: 08/22/2008)
08/25/08	72	NOTICE OF NON-OPPOSITION to MOTION to Intervene 20 Response of Plaintiff American Trucking Associations to NRDC Motion to Intervene filed by Plaintiff American Trucking Associations, Inc. (Attachments: # 1 Exhibit A)(McNatt, Christopher) (Entered: 08/25/2008)
08/29/08	78	REPLY support of a motion MOTION to Intervene 20 filed by Intervenor Defendants Natural Resources Defense Council, Sierra Club, Coalition For Clean Air Inc. (Pettit, David) (Entered: 08/29/2008)

08/29/08	79	REPLY support MOTION for Preliminary Injunction re: on Counts I And II of Plaintiffs Complaint 13 Reply to Defendants' Opposition filed by Plaintiff American Trucking Associations, Inc. (Attachments: # 1 Declaration Supplemental Declaration of Curtis E. Whalen in Support of Plaintiff's Motion for Preliminary Injunction)(McNatt, Christopher) (Entered: 08/29/2008)
09/04/08	85	MINUTES OF IN CHAMBERS ORDER by Judge Christina A. Snyder re: NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, AND COALITION FOR CLEAN AIRS MOTION TO INTERVENE AS DEFENDANTS 20 and NATIONAL RETAIL FEDERATIONS MOTION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE 45: The Court finds these motions appropriate for decision without oral argument. Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing date of September 8, 2008, is hereby vacated, and the matter is hereby taken under submission. The Court GRANTS proposed intervenors motion to intervene. The Court GRANTS NRFs motion for leave to participate as amicus curiae. (pso) (Entered: 09/04/2008)

09/09/08	89	ORDER by Judge Christina A. Snyder DENYING PLAINTIFFS MOTION FOR PRELIMINARY INJUNCTION 13: Plaintiff has not demonstrated a likelihood of success in showing that there is not an exception to preemption under the FAAA by reason of the safety exception. Furthermore, plaintiff has not demonstrated that failure to grant the injunction will result in irreparable injury. Finally, the balance of hardships and the public interest tip decidedly in favor of denying the injunction. For the foregoing reasons, the Court DENIES plaintiffs motion for preliminary injunction. IT IS SO ORDERED. (pso) (Entered: 09/09/2008)
09/10/08	90	NOTICE OF APPEAL to the 9th CCA filed by plaintiff American Trucking Associations, Inc. Appeal of Order, 89. (Filing fee $455, receipt number 0973000000004246050.) (Attachments: # 1 Exhibit A)(McNatt, Christopher) (Entered: 09/10/2008)

09/17/08	96	ANSWER to Complaint- (Discovery), Complaint- (Discovery) 1 filed by defendants The City of Long Beach, The Harbor Department of the City of Long Beach, The Board of Harbor Commissioner of the City of Long Beach. (Gale, Paul) (Entered: 09/17/2008)
09/17/08	99	ANSWER to Complaint- (Discovery), Complaint- (Discovery) 1 filed by Defendants The Board of Harbor Commissioners of the City of Los Angeles, The City of Los Angeles, The Harbor Department of the City of Los Angeles. (Delgadillo, Bryant) (Entered: 09/17/2008)
03/20/09	106	MANDATE of 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals 90, CCA # 08-56503. The district court decision is REVERSED and REMANDED. Mandate received in this district on 03/20/09. (cbr) (Entered: 03/23/2009)
04/03/09	114	NOTICE OF MOTION AND MOTION for Preliminary Injunction re: on Counts I and II of Complaint filed by plaintiff American Trucking Associations, Inc. Motion set for hearing on 4/27/2009 at 10:00 AM before Judge Christina A. Snyder. (Attachments: # 1 Memorandum of Points and Authorities, # 2 Declaration of Christopher C.

McNatt, Jr., # 3 Proposed Order, # 4 Proof of Service) (McNatt, Christopher) (Entered: 04/03/2009)

04/13/09 127 OPPOSITION to MOTION for Preliminary Injunction re: on Counts I and II of Complaint 114 filed by Defendants The Board of Harbor Commissioners of the City of Los Angeles, The City of Los Angeles, The Harbor Department of the City of Los Angeles. (Attachments: # 1 Declaration of John M. Holmes, # 2 Proof of Service) (Rosenthal, Steven) (Entered: 04/13/2009)

04/13/09 128 MEMORANDUM in Opposition to MOTION for Preliminary Injunction re: on Counts I and II of Complaint 114 filed by Defendants The City of Long Beach, The Harbor Department of the City of Long Beach, The Board of Harbor Commissioner of the City of Long Beach. (Gale, Paul) (Entered: 04/13/2009)

04/13/09 129 MEMORANDUM in Opposition to Plaintiff's Motion on Remand for Preliminary Injunction filed by Intervenor Defendants Natural Resources Defense Council, Sierra Club, Coalition For Clean Air Inc. (Pettit, David) (Entered: 04/13/2009)

04/28/09 155 ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S

		MOTION ON REMAND FOR ENTRY OF PRELIMINARY INJUNCTION OF COUNTS I AND II OF COMPLAINT by Judge Christina A. Snyder: The Court GRANTS in part and DENIES in part Plaintiff American Trucking Associations, Inc.'s Motion on Remand for Entry of Preliminary Injunction 114. It is ORDERED that a preliminary injunction issue pending the trial herein, or until further order of Court. See document for specific details. (gk) **PRELIMINARY INJUNCTION IS DISSOLVED BY FINAL JUDGMENT OF 9/10/2010 309** Modified on 9/15/2010 (gk). (Entered: 04/29/2009)
05/14/09	158	NOTICE OF APPEAL to the 9th CCA filed by plaintiff American Trucking Associations, Inc. Appeal of Order on Motion for Preliminary Injunction, 155. (Filing fee $455, receipt number 0973000000005316433.) (Attachments: # 1 Exhibit A) (McNatt, Christopher) (Entered: 05/14/2009)
05/26/09	164	STIPULATION to CORRECT Order on Motion for Preliminary Injunction, 155 filed by plaintiff American Trucking Associations, Inc. (Attachments: # 1 Exhibit A, # 2

		Proposed Order, # 3 Proof of Service) (McNatt, Christopher) (Entered: 05/26/2009)
06/03/09	166	ORDER the Court shall issue a revised Order Granting in part and Denying in part Plaintiffs Motion on Remand for Entry of Preliminary Injunction of Counts I and II of Complaint revising the April 28, 2009 Order of this Court pursuant to the terms of the Stipulation re Modification to April 28, 2009 Order submitted by the parties 164 by Judge Christina A. Snyder (lc) (Entered: 06/04/2009)
10/19/09	203	STIPULATION for Settlement and Joint Motion for Voluntary Dismissal With Prejudice Between Plaintiff ATA and Long Beach Defendants filed by plaintiff American Trucking Associations, Inc. (Attachments: # 1 Exhibit A, # 2 Proposed Order, # 3 Proof of Service) (McNatt, Christopher) (Entered: 10/19/2009)
10/20/09	206	ORDER OF VOLUNTARY DISMISSAL WITH PREJUDICE OF LONG BEACH DEFENDANTS by Judge Christina A. Snyder: Upon Stipulation of Settlement and Joint Motion for Voluntary Dismissal With Prejudice 203, it is hereby ORDERED that the claims against

		The City of Long Beach, The Harbor Department of the City of Long Beach and The Board of Harbor Commissioner of the City of Long Beach (the "Long Beach Defendants") in the Complaint shall be and hereby dismissed with prejudice only as to the Long Beach Defendants, and each of the parties shall bear its own costs and attorney fees. See document for details. (gk) (Entered: 10/21/2009)
11/02/09	213	NOTICE OF MOTION AND MOTION to Compel Production of Documents Withheld Due to the Deliberative Process Privilege filed by plaintiff American Trucking Associations, Inc. Motion set for hearing on 11/23/2009 at 02:00 PM before Magistrate Judge Carolyn Turchin. (Attachments: # 1 Joint Stipulation, # 2 Exhibit O, # 3 Proof of Service) (McNatt, Christopher) (Entered: 11/02/2009)
11/12/09	221	(IN CHAMBERS): ORDER DENYING MOTION TO COMPEL PRODUCTION OF DOCUMENTS WITHHELD DUE TO THE DELIBERATIVE PROCESS PRIVILEGE; ORDERING FURTHER REVIEW OF PRIVILEGE LOG; AND; TAKING NOVEMBER 23, 2009 HEARING OFF CALENDAR by Magistrate

Judge Carolyn Turchin: denying 213 Motion to Compel (dam) (Entered: 11/12/2009)

11/23/09 226 NOTICE OF MOTION AND MOTION for Review of The Order of the Magistrate Judge Declining to Require Production of Documents Withheld Due to the Deliberative Process Privilege re Order on Motion to Compel, 221 filed by plaintiff American Trucking Associations, Inc. Motion set for hearing on 12/14/2009 at 10:00 AM before Judge Christina A. Snyder. (Attachments: # 1 Motion for Review, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F, # 8 Exhibit G, # 9 Exhibit H, # 10 Exhibit I, # 11 Exhibit J, # 12 Proof of Service) (McNatt, Christopher) (Entered: 11/23/2009)

11/30/09 230 MEMORANDUM in Opposition to MOTION for Review of The Order of the Magistrate Judge Declining to Require Production of Documents Withheld Due to the Deliberative Process Privilege re Order on Motion to Compel, 221 MOTION for Review of The Order of the Magistrate Judge Declining to Require Production of Documents Withheld Due to the Deliberative Process Privilege re Order on Motion to Compel, 221 MOTION for Review of

		The Order of the Magistrate Judge Declining to Require Production of Documents Withheld Due to the Deliberative Process Privilege re Order on Motion to Compel, 221 226 filed by Defendants The Board of Harbor Commissioners of the City of Los Angeles, The City of Los Angeles, The Harbor Department of the City of Los Angeles. (Attachments: # 1 Exhibit A) (Rosenthal, Steven) (Entered: 11/30/2009)
12/05/09	234	REPLY support MOTION for Review of The Order of the Magistrate Judge Declining to Require Production of Documents Withheld Due to the Deliberative Process Privilege re Order on Motion to Compel, 221 MOTION for Review of The Order of the Magistrate Judge Declining to Require Production of Documents Withheld Due to the Deliberative Process Privilege re Order on Motion to Compel, 221 MOTION for Review of The Order of the Magistrate Judge Declining to Require Production of Documents Withheld Due to the Deliberative Process Privilege re Order on Motion to Compel, 221 226 filed by Plaintiff American Trucking Associations, Inc. (Attachments: # 1 Proof of Service) (McNatt,

Christopher) (Entered: 12/05/2009)

12/09/09 235 NOTICE OF MOTION AND MOTION for Summary Judgment as to Plaintiff's Complaint filed by plaintiff American Trucking Associations, Inc. Motion set for hearing on 1/11/2010 at 10:00 AM before Judge Christina A. Snyder. (Attachments: # 1 Plaintiff's Statement of Points and Authorities in Support of Motion for Summary Judgment, # 2 [Proposed] Statement of Uncontroverted Facts and Conclusions of Law in Support of American Trucking Associations, Inc.'s Motion for Summary Judgment, # 3 Declaration Curtis E. Whalen, # 4 Declaration Joshua M. Owen, # 5 Declaration Christopher C. McNatt, Jr., # 6 Exhibit 1-4 to McNatt Declaration, # 7 Exhibit 5-7 to McNatt Declaration, # 8 Exhibit 8 Part 1 to McNatt Declaration, # 9 Exhibit 8 Part 2 to McNatt Declaration, # 10 Exhibit 9-12 to McNatt Declaration, # 11 Exhibit 13-14 to McNatt Declaration, # 12 Exhibit 15-18 to McNatt Declaration, # 13 Exhibit 19 Part 1 to McNatt Declaration, # 14 Exhibit 19 Part 2 to McNatt Declaration, # 15 Exhibit 19 Part 3 to McNatt Declaration, # 16 Exhibit 20-23 to McNatt Declaration, # 17 Exhibit

		24-27 to McNatt Declaration, # 18 Exhibit 28-29 to McNatt Declaration, # 19 Proposed Order, # 20 Proof of Service) (McNatt, Christopher) (Entered: 12/09/2009)
12/09/09	236	NOTICE OF MOTION AND MOTION for Summary Judgment as to All Counts of Plaintiff's Complaint, or In the Alternative, Partial Summary Judgment as to Count III filed by defendants The Board of Harbor Commissioners of the City of Los Angeles, The City of Los Angeles, The Harbor Department of the City of Los Angeles. Motion set for hearing on 1/11/2010 at 10:00 AM before Judge Christina A. Snyder. (Attachments: # 1 Memorandum of Points and Authorities in Support of Motion for Summary Judgment, # 2 Statement of Uncontroverted Facts and Conclusions of Law, # 3 Declaration of Geraldine Knatz, # 4 Exhibit 1-6 to Knatz Declaration, # 5 Exhibit 7-15 to Knatz Declaration, # 6 Exhibit 16-23 to Knatz Declaration, # 7 Declaration of David L. Cousineau, # 8 Exhibit 1-12 to Cousineau Declaration, # 9 Declaration of Charles A. Towsley, # 10 Exhibit A to Towsley Declaration, # 11 Proposed Order, # 12 Proof of Service) (Rosenthal, Steven)

(Entered: 12/09/2009)

12/21/09 238 ORDER RE: PLAINTIFF'S MOTION FOR REVIEW OF THE ORDER OF THE MAGISTRATE JUDGE DECLINING TO REQUIRE PRODUCTION OF DOCUMENTS by Judge Christina A. Snyder: the Court hereby DENIES ATAs motion for review of the Magistrate Judge's November 12, 2009 order 226. Pursuant to the Magistrate Judge's order, the Court orders defendants to review the documents included in the privilege log to confirm that they fall within the categories represented in the declarations, and are privileged. To the extent any non-privileged responsive documents are discovered, they shall be produced on or before December 30, 2009. To the extent that no additional non-privileged documents are discovered, counsel for defendants shall submit a declaration so stating and setting forth the review efforts undertaken. Defendants are further precluded from presenting at trial any evidence that they have withheld based on their assertion of the deliberative process privilege. (jre) (Entered: 12/23/2009)

12/24/09 239 OPPOSITION to MOTION for Summary Judgment as to Plaintiff's

		Complaint 235 filed by Defendants The Board of Harbor Commissioners of the City of Los Angeles, The City of Los Angeles, The Harbor Department of the City of Los Angeles. (Attachments: # 1 Statement of Genuine Issues, # 2 Declaration of Geraldine Knatz, # 3 Exhibit 1-9 to Knatz Declaration, # 4 Declaration of John Holmes, # 5 Exhibit 1-12 to Holmes Declaration, # 6 Declaration of Susanna Chu, # 7 Exhibit 1-15 to Chu Declaration, # 8 Declaration of James Hall, # 9 Exhibit A-C to Hall declaration, # 10 Declaration of Jeffrey Brown, # 11 Exhibit A-B to Brown declaration, # 12 Proof of Service) (Rosenthal, Steven) (Entered: 12/24/2009)
12/24/09	240	OPPOSITION to MOTION for Summary Judgment as to All Counts of Plaintiff's Complaint, or In the Alternative, Partial Summary Judgment as to Count III 236 filed by Plaintiff American Trucking Associations, Inc. (Attachments: # 1 Statement of Genuine Issues in Opposition to Defendants' Motion for Summary Judgment, # 2 Declaration Christopher C. McNatt, Jr., # 3 Exhibit 1-4 to McNatt Declaration, # 4 Exhibit 5 - Part 1 to McNatt Declaration, # 5 Exhibit 5 - Part 2 to McNatt Declaration, # 6 Exhibit 6-7

		to McNatt Declaration, # 7 Exhibit 8-13 to McNatt Declaration, # 8 Exhibit 14 to McNatt Declaration, # 9 Exhibit 15-19 to McNatt Declaration, # 10 Proof of Service) (McNatt, Christopher) (Entered: 12/24/2009)
12/28/09	242	JOINDER in MOTION for Summary Judgment as to Plaintiff's Complaint 235 Joinder in Opposition filed by Intervenor Defendants Natural Resources Defense Council, Sierra Club, Coalition For Clean Air Inc. (Pettit, David) (Entered: 12/28/2009)
01/05/10	246	REPLY in support of MOTION for Summary Judgment as to All Counts of Plaintiff's Complaint, or In the Alternative, Partial Summary Judgment as to Count III 236 filed by Defendants The Board of Harbor Commissioners of the City of Los Angeles, The City of Los Angeles, The Harbor Department of the City of Los Angeles. (Attachments: # 1 Defendants' Reply to Plaintiff's Statement of Genuine Issues, # 2 Declaration of John Holmes, # 3 Exhibit A to Holmes Declaration, # 4 Declaration of Susanna Chu, # 5 Exhibit 1 to Chu Declaration, # 6 Exhibit 2 to Chu Declaration, # 7 Proof of Service) (Rosenthal, Steven) (Entered: 01/05/2010)

01/05/10	247	REPLY support MOTION for Summary Judgment as to Plaintiff's Complaint 235 filed by Plaintiff American Trucking Associations, Inc. (Attachments: # 1 Supplemental Statement of Undisputed Facts, # 2 Evidentiary Objections of ATA, # 3 Declaration Christopher C. McNatt, Jr., # 4 Exhibit McNatt Dec. Exh. 1-5, # 5 Exhibit McNatt Dec. Exh. 6-11, # 6 Exhibit McNatt Dec. Exh. 12, # 7 Declaration Annette Sandberg, # 8 Declaration Stephen Nieman, # 9 Proof of Service) (McNatt, Christopher) (Entered: 01/05/2010)
02/08/10	255	MEMORANDUM of CONTENTIONS of FACT and LAW filed by Defendants-Intervenors Natural Resources Defense Council, Sierra Club, Coalition For Clean Air Inc. (Pettit, David) (Entered: 02/08/2010)
02/08/10	257	MEMORANDUM of CONTENTIONS of FACT and LAW filed by defendants The Board of Harbor Commissioners of the City of Los Angeles, The City of Los Angeles, The Harbor Department of the City of Los Angeles. (Attachments: # 1 Proof of Service) (Rosenthal, Steven) (Entered: 02/08/2010)
02/08/10	258	MEMORANDUM of

		CONTENTIONS of FACT and LAW filed by Plaintiff American Trucking Associations, Inc. (Attachments: # 1 Proof of Service) (McNatt, Christopher) (Entered: 02/08/2010)
02/24/10	267	NOTICE of Decision: Affirming April 28, 2009 Ruling filed by defendants The Board of Harbor Commissioners of the City of Los Angeles, The City of Los Angeles, The Harbor Department of the City of Los Angeles. (Attachments: # 1 Ninth Circuit decision) (Rosenthal, Steven) (Entered: 02/24/2010)
02/25/10	269	MINUTES (IN CHAMBERS) by Judge Christina A. Snyder: On 2/25/2010, the Court heard oral argument on the instant summary judgment motions. Having carefully reviewed the briefs and arguments of the parties, the Court determines that both motions raise substantial questions of fact that are better resolved at trial. Accordingly, the Court hereby DENIES plaintiff's 235 and defendants' 236 Cross Motions for Summary Judgment. Court Reporter: Not Present. (gk) (Entered: 03/01/2010)
03/18/10	274	MANDATE of 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals 158, CCA # 09-55749. The decision of the district court is

affirmed in part. Mandate received in this district on 3/18/2010. (dmap) (Entered: 03/19/2010)

04/13/10 284 TRIAL BRIEF filed by plaintiff American Trucking Associations, Inc. (Attachments: # 1 Appendix A-C, # 2 Proof of Service) (McNatt, Christopher) (Entered: 04/13/2010)

04/13/10 285 NOTICE OF LODGING filed re Trial Brief 284 (Attachments: # 1 Plaintiff's [Proposed] Findings of Fact and Conclusions of Law) (McNatt, Christopher) (Entered: 04/13/2010)

04/13/10 286 TRIAL BRIEF filed by defendants The Board of Harbor Commissioners of the City of Los Angeles, The City of Los Angeles, The Harbor Department of the City of Los Angeles. (Rosenthal, Steven) (Entered: 04/13/2010)

04/13/10 287 NOTICE OF LODGING filed re Trial Brief 286 (Attachments: # 1 Proposed Findings of Fact and Conclusions of Law) (Rosenthal, Steven) (Entered: 04/13/2010)

04/14/10 288 TRIAL BRIEF JOINDER TO TRIAL BRIEF AND PROPOSED CONTENTIONS FACT AND LAW filed by Defendants-Intervenors Coalition For Clean Air Inc, Natural Resources Defense Council, Sierra

		Club. (Pettit, David) (Entered: 04/14/2010)
04/23/10	294	MINUTES OF Court Trial (4th day) held before Judge Christina A. Snyder: Witnesses called, sworn and testified. Exhibits identified and admitted. Clerk reviewed admitted exhibits with counsel to be submitted to the Jury/Court for deliberation/findings. Bench Trial continued to 4/27/2010 09:30 AM before Judge Christina A. Snyder. Court Reporter: Laura Elias. (gk) (Entered: 05/05/2010)
05/14/10	299	Defendants-Intervenors' Post-Trial Brief (Pettit, David) (Entered: 05/14/2010)
05/14/10	300	TRIAL BRIEF (post-trial) filed by defendants The Board of Harbor Commissioners of the City of Los Angeles, The City of Los Angeles, The Harbor Department of the City of Los Angeles. (Rosenthal, Steven) (Entered: 05/14/2010)
05/14/10	301	TRIAL BRIEF Plaintiff's Post-Trial Brief filed by plaintiff American Trucking Associations, Inc. (Attachments: # 1 Proof of Service) (McNatt, Christopher) (Entered: 05/14/2010)
08/26/10	303	FINDINGS OF FACT AND CONCLUSIONS OF LAW signed by

		Judge Christina A. Snyder: The Court awards judgment in favor of defendants City of Los Angeles, Harbor Department of the City of Los Angeles, and Board of Harbor Commissioners of the City of Los Angeles. Defendants are directed to prepare a form of final judgment in accordance with the Rules of this Court. See document for details. (Made JS-6. Case Terminated.) (gk) (Entered: 08/26/2010)
08/31/10	304	NOTICE OF LODGING filed re Findings of Fact & Conclusions of Law. Terminated Case, 303 (Attachments: # 1 Proposed Final Judgment) (Rosenthal, Steven) (Entered: 08/31/2010)
09/07/10	306	OBJECTIONS to Notice of Lodging 304 Objections to Form of Judgment filed by Plaintiff American Trucking Associations, Inc. (McNatt, Christopher) (Entered: 09/07/2010)
09/08/10	307	RESPONSE filed by Defendants The Board of Harbor Commissioners of the City of Los Angeles, The City of Los Angeles, The Harbor Department of the City of Los Angelesto Objections- non-motion 306 (Rosenthal, Steven) (Entered: 09/08/2010)
09/10/10	309	FINAL JUDGMENT by Judge Christina A. Snyder: It is hereby

ORDERED AND ADJUDGED as follows: (1) Judgment is entered in favor of defendants the City of Los Angeles, the Harbor Department of the City of Los Angeles, and the Board of Harbor Commissioners of the City of Los Angeles and defendants-intervenors Natural Resources Defense Council, Sierra Club and Coalition for Clean Air (collectively "defendants"). (2) Plaintiff American Trucking Associations, Inc. shall take nothing as a result of any of the first, second and third claims for relief in this action, and this action is hereby dismissed on the merits. (3) The preliminary injunction entered by the Court on 4/28/2009 155 is dissolved. (4) Defendants shall recover their costs of suit. (gk) (Entered: 09/15/2010)

09/16/10 310 NOTICE OF APPEAL to the 9th CCA filed by plaintiff American Trucking Associations, Inc. Appeal of Judgment, 309 (Appeal fee of $455 receipt number 0973-7526290 paid.) (Attachments: # 1 Exhibit A - Final Judgment, # 2 Proof of Service) (McNatt, Christopher) (Entered: 09/16/2010)

09/24/10 313 NOTICE OF MOTION AND MOTION to Stay pending Appeal of Final Judgment filed by plaintiff

American Trucking Associations, Inc. Motion set for hearing on 10/25/2010 at 10:00 AM before Judge Christina A. Snyder. (Attachments: # 1 Memorandum, # 2 Declaration Christopher C. McNatt, Jr., # 3 Exhibit A-B to McNatt Declaration, # 4 Exhibit C-M to McNatt Declaration, # 5 Exhibit N Part 1 to McNatt Declaration, # 6 Exhibit N Part 2 to McNatt Declaration, # 7 Exhibit O to McNatt Declaration, # 8 Appendix Trial Materials, # 9 Exhibit A-G to Appendix of Trial Materials, # 10 Exhibit H Part 1 to Appendix of Trial Materials, # 11 Exhibit H Part 2 to Appendix of Trial Materials, # 12 Exhibit I to Appendix of Trial Materials, # 13 Proposed Order, # 14 Proof of Service) (McNatt, Christopher) (Entered: 09/24/2010)

10/04/10 316 OPPOSITION in opposition to re: MOTION to Stay pending Appeal of Final Judgment 313 filed by Defendants The Board of Harbor Commissioners of the City of Los Angeles, The City of Los Angeles, The Harbor Department of the City of Los Angeles. (Attachments: # 1 Declaration of John Holmes, # 2 Declaration of Cindy Pirozzi, # 3 Declaration of Deborah Aguet, # 4 Declaration of Suzanne MacKay, # 5

		Appendix of Trial Transcript Excerpts) (Rosenthal, Steven) (Entered: 10/04/2010)
10/04/10	317	Opposition re: MOTION to Stay pending Appeal of Final Judgment 313 filed by Intervenor Defendants Coalition For Clean Air Inc, Natural Resources Defense Council, Sierra Club. (Attachments: # 1 Declaration of Patricia Castellanos, # 2 Declaration of Luis Benitez, # 3 Declaration of Jorge Garcia, # 4 Declaration of Aristedes Mejia, # 5 Declaration of David Pettit) (Pettit, David) (Entered: 10/04/2010)
10/08/10	320	REPLY in support of MOTION to Stay pending Appeal of Final Judgment 313 filed by Plaintiff American Trucking Associations, Inc. (Attachments: # 1 Declaration Christopher C. McNatt, Jr., # 2 Exhibit A-E to McNatt Declaration, # 3 Proof of Service) (McNatt, Christopher) (Entered: 10/08/2010)
10/25/10	326	MINUTES OF Motion Hearing held before Judge Christina A. Snyder: The Court GRANTS in part and DENIES in part plaintiff American Trucking Associations, Inc.'s ("ATA") motion for an injunction pending appeal 313. Specifically, the Court GRANTS ATA's motion with respect to the employee driver provision and

		DENIES ATA's motion for all other provisions of the Concession Agreement. Court Reporter: Laura Elias. (gk) (Entered: 10/26/2010)
09/28/11	346	ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals, 310 filed by American Trucking Associations, Inc., CCA # 10-56465. The parties shall bear their own costs on appeal. Fed. R. App. P. 39(a)(4). Order received in this district on 9/28/2011. (lr) (Entered: 09/30/2011)
10/18/11	347	MANDATE of 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals, 310, CCA # 10-56465. We affirm the district court's holdings that the financial capability, maintenance, off-street parking, and placard provisions are not preempted. We reverse the district court's conclusion that the employee-driver provision is saved from preemption by the market participant doctrine, and remand for further proceedings consistent with this opinion. The Judgment of the district court is Affirmed in part and Reversed in part. Mandate received in this district on 10/18/11. (car) (Entered: 10/20/2011)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-56503

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Plaintiff-Appellant,

v.

THE CITY OF LOS ANGELES, ET AL.,
Defendant-Appellees.

RELEVANT DOCKET ENTRIES

Date	#	Docket Text
09/11/08	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. PRELIMINARY INJUNCTION APPEAL. RULE 3-3 APPLIES (GR)
09/12/08	7	Filed (ECF) Appellant American Trucking Associations, Inc. Motion for injunction pending appeal, Motion to expedite case. Date of service: 09/12/2008. [6645177] (CCM)
09/15/08	8	Filed Appellant American Trucking Associations, Inc. excerpts of record in 5 volumes. Served on 09/13/2008 (WP)

09/16/08	10	Filed (ECF) Appellees Coalition for Clean Air, Inc., Natural Resources Defense Council and Sierra Club response opposing motion (Motion (ECF Filing), motion for injunction pending appeal, motion to expedite case). Date of service: 09/16/2008. [6647992] (DRP)
09/17/08	11	Filed (ECF) Appellees The Board of Harbor Commissioners of the City of Long Beach, The City of Long Beach and The Harbor Department of the City of Long Beach response opposing motion (Motion (ECF Filing), motion for injunction pending appeal, motion to expedite case). Date of service: 09/17/2008. [6648039] (PLG)
09/17/08	13	Filed (ECF) Appellees The Board of Harbor Commissioners of the City of Los Angeles, The City of Los Angeles and The Harbor Department of the City of Los Angeles response opposing motion (Motion (ECF Filing), motion for injunction pending appeal, motion to expedite case). Date of service: 09/17/2008. [6648389] (BSD)
09/17/08	17	Filed (ECF) Appellant American Trucking Associations, Inc. reply to response (Response to Motion (ECF

Filing), Response to Motion (ECF Filing), Response to Motion (ECF Filing)). Date of service: 09/17/2008. [6649387] (CCM)

10/08/08 26 Submitted (ECF) Opening brief for review. Submitted by Appellant American Trucking Associations, Inc. Date of service: 10/08/2008. [6670227] (CCM)

10/21/08 34 Filed original and 15 copies of Amicus Curiae USA amicus brief of 28 pages. Served on 10/20/2008 (GLS)

10/29/08 40 Filed (ECF) Appellees Coalition for Clean Air, Inc., Natural Resources Defense Council, Sierra Club, The Board of Harbor Commissioners of the City of Long Beach, The Board of Harbor Commissioners of the City of Los Angeles, The City of Long Beach, The City of Los Angeles, The Harbor Department of the City of Long Beach and The Harbor Department of the City of Los Angeles reply to response (Response to Motion (ECF Filing)). Date of service: 10/29/2008. [6690061] (BSD)

11/05/08 45 Submitted (ECF) Answering brief for review. Submitted by Appellees Coalition for Clean Air, Inc., Natural Resources Defense Council and

Sierra Club. Date of service: 11/05/2008. [6698724] (ML)

11/26/08 56 Submitted (ECF) Answering brief for review and filed Motion to file oversized brief. Submitted by Appellees The Board of Harbor Commissioners of the City of Los Angeles, The City of Los Angeles and The Harbor Department of the City of Los Angeles. Date of service: 11/26/2008. [6721256] (SSR)

12/03/08 60 Filed (ECF) Appellees The Board of Harbor Commissioners of the City of Los Angeles, The City of Los Angeles and The Harbor Department of the City of Los Angeles reply to response (Response to Motion (ECF Filing), Brief Submitted for Review (ECF Filing), Motion (ECF Filing)). Date of service: 12/03/2008. [6726306] (SSR)

12/16/08 65 Filed original and 15 copies of Amicus Curiae Attorney General CA amicus brief of 18 pages. Served on 12/08/2008 (GLS)

12/19/08 63 Submitted (ECF) Reply brief for review and filed Motion to file oversized brief. Submitted by Appellant American Trucking Associations, Inc. Date of service: 12/19/2008. [6745536] (CCM)

03/04/09	81	ARGUED AND SUBMITTED TO ROBERT R. BEEZER, FERDINAND F. FERNANDEZ and RICHARD A. PAEZ. (BG)
03/20/09	82	FILED OPINION (ROBERT R. BEEZER, FERDINAND F. FERNANDEZ and RICHARD A. PAEZ) REVERSED and REMANDED. No petition for rehearing will be entertained and the mandate shall issue forthwith. FFF Authoring, FILED AND ENTERED JUDGMENT. (RP)
03/20/09	83	MANDATE ISSUED. (RRB, FFF and RAP) (RR)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-55749

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Plaintiff-Appellant,

v.

THE CITY OF LOS ANGELES, ET AL.,
Defendant-Appellees.

RELEVANT DOCKET ENTRIES

DATE	#	Docket Text
05/14/09	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND CADS: No. Referred to MOATT pursuant to 9th Cir. R. 3-3. (JN)
06/11/09	5	Submitted (ECF) Opening brief for review. Submitted by Appellant American Trucking Associations, Inc. Date of service: 06/11/2009. [6953942] (CCM)
06/11/09	9	Filed Appellant American Trucking Associations, Inc. excerpts of record in 6 volumes. [6955926] (FT)
07/09/09	24	Submitted (ECF) Answering brief for review. Submitted by-Coalition for Clean Air, Inc., Natural Resources

		Defense Council and Sierra Club. Date of service: 07/09/2009. [6986439]--[COURT corrected docket text--07/10/2009 by MA] (ML)
07/13/09	26	Filed Appellees Coalition for Clean Air, Inc., Natural Resources Defense Council and Sierra Club supplemental excerpts of record on appeal in 1 volumes. [6993307] (FT)
07/30/09	28	Submitted (ECF) Answering brief for review. Submitted by Appellees The Board of Harbor Commissioners of the City of Long Beach, The Board of Harbor Commissioners of the City of Los Angeles, The City of Long Beach, The City of Los Angeles, The Harbor Department of the City of Long Beach and The Harbor Department of the City of Los Angeles. Date of service: 07/30/2009. [7010119] (SSR)
07/31/09	32	Filed Appellees Coalition for Clean Air, Inc., Natural Resources Defense Council, Sierra Club, The Board of Harbor Commissioners of the City of Long Beach and The Board of Harbor Commissioners of the City of Los Angeles supplemental excerpts of record on appeal in 1 volumes. [7011775] (FT)
09/03/09	36	Submitted (ECF) Reply brief for review. Submitted by Appellant American Trucking Associations, Inc. Date of service: 09/03/2009.

		[7051464] (CCM)
09/04/09	39	Filed Appellant American Trucking Associations, Inc. supplemental excerpts of record on appeal in 1 volume. [7053598] (LA)
09/08/09	41	Filed (ECF) Appellees Coalition for Clean Air, Inc., Natural Resources Defense Council and Sierra Club response to motion (Motion (ECF Filing), Motion (ECF Filing) motion to assign case to prior panel). Date of service: 09/08/2009. [7054306] (ML)
09/14/09	44	Filed (ECF) Appellant American Trucking Associations, Inc. reply to response (Response to Motion (ECF Filing), Response to Motion (ECF Filing)). Date of service: 09/14/2009. [7060513] (CCM)
10/27/09	46	Filed (ECF) Appellant American Trucking Associations, Inc. Correspondence: Notice of Partial Settlement. Date of service: 10/27/2009 [7109625] (CCM)
11/02/09	47	Filed certificate of record on appeal. RT filed in DC 10/30/2009 [7117799] (JFF)
11/04/09	50	ARGUED AND SUBMITTED TO MYRON H. BRIGHT, HARRY PREGERSON and RONALD M. GOULD. [7119345] (BG)
02/24/10	52	FILED OPINION (MYRON H.

		BRIGHT, HARRY PREGERSON and RONALD M. GOULD) Accordingly, we AFFIRM the district court's order denying injunctive relief in part to ATA with one exception noted in the text. 6 Judge: MHB Authoring, Judge: HP, Judge: RMG . FILED AND ENTERED JUDGMENT. [7242478] (PH)
03/18/10	53	MANDATE ISSUED. (MHB, HP and RMG) [7270372] (TB)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-56465

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Plaintiff-Appellant,

v.

THE CITY OF LOS ANGELES, ET AL.,
Defendant-Appellees.

RELEVANT DOCKET ENTRIES

DATE	#	Docket Text
09/16/10	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: No. The schedule is set as follows: Transcript ordered by 10/18/2010. Transcript due 01/18/2011. Appellant American Trucking Associations, Inc. opening brief due 02/28/2011. Appellee Coalition for Clean Air, Inc., Appellee Natural Resources Defense Council, Appellee Sierra Club, Appellee The Board of Harbor Commissioners of the City of Los Angeles, Appellee The City of Los Angeles and Appellee The Harbor Department of the City of Los Angeles answering brief due

		03/30/2011. Appellant's optional reply brief is due 14 days after service of the answering brief. [7477070] (JN)
12/28/10	13	Submitted (ECF) Opening brief for review. Submitted by Appellant American Trucking Associations, Inc. Date of service: 12/28/2010. [7593867]--[COURT UPDATE: Replaced PDF of brief. Resent NDA. 12/28/2010 by TT] (CCM)
12/29/10	16	Filed Appellant American Trucking Associations, Inc. excerpts of record in 5 volumes. Served on 12/28/2010. [7595652] (LA)
01/31/11	30	Submitted (ECF) Answering brief for review. Submitted by Appellees The Board of Harbor Commissioners of the City of Los Angeles, The City of Los Angeles and The Harbor Department of the City of Los Angeles. Date of service: 01/31/2011. [7630633] (SSR)
01/31/11	32	Submitted (ECF) Answering brief for review. Submitted by Appellees Coalition for Clean Air, Inc., Natural Resources Defense Council and Sierra Club. Date of service: 01/31/2011. [7631175] (DRP)
02/01/11	35	Filed Appellees The Board of Harbor Commissioners of the City of Los Angeles, The City of Los Angeles and

		The Harbor Department of the City of Los Angeles supplemental excerpts of record on appeal in 1 volume. [7632766] (LA)
02/15/11	40	Submitted (ECF) Reply brief for review. Submitted by Appellant American Trucking Associations, Inc. Date of service: 02/15/2011. [7649275] (CCM)
02/17/11	42	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by STATE OF CALIFORNIA. Date of service: 02/17/2011. [7653522]--[COURT UPDATE: Corrected docket text and event to reflect content of filing. Attached corrected Amicus brief. Resent NDA. 02/22/2011 by RY] (SLD)
02/25/11	48	Submitted (ECF) Supplemental brief for review. Submitted by Appellant American Trucking Associations, Inc. Date of service: 02/24/2011. [7660231] (CCM)
03/10/11	49	Filed clerk order (Deputy Clerk:GSS): The State of California's opposed motion to file a late amicus brief is granted. Appellant American Trucking Associations, Inc.'s motion to file a reply to State of California's amicus brief, and the attached proposed reply with the motion, is referred to the merits panel for

		resolution. [7676296] (SM)
06/10/11	57	ARGUED AND SUBMITTED TO BETTY BINNS FLETCHER, N. RANDY SMITH and RUDI M. BREWSTER. [7781504] (BG)
09/26/11	58	FILED OPINION (BETTY BINNS FLETCHER, N. RANDY SMITH and RUDI M. BREWSTER). AFFIRMED IN PART; REVERSED IN PART. Judge: BBF Authoring, Judge: NRS Dissenting, FILED AND ENTERED JUDGMENT. [7905490] (RP)
10/18/11	60	MANDATE ISSUED. (BBF, NRS and RB) [7931403] (TB)
10/31/11	61	Filed order and amended opinion (BETTY BINNS FLETCHER, N. RANDY SMITH and RUDI M. BREWSTER). The majority opinion filed September 26, 2011, slip op. 18193, is hereby amended as follows: 1. Lines 20-25 at slip op. 18208 are deleted and the following are substituted in their stead: "The district court's factual determinations are reviewed for clear error, and may be reversed only if they are "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." Hinkson, 585 F.3d at 1251." [7947756] (RP)
12/28/11	62	Received notice from the Supreme

Court: petition for certiorari filed on 12/22/2011. Supreme Court Number 11-798. [8014062] (HH)

IMPORTANT: CLICK HERE TO SEE NOTICE OF COURT DECISION AND IMPACT ON CLEAN TRUCK PROGRAM.

THE PORT SHALL REFRAIN FROM ENFORCING CERTAIN PROVISIONS OF THE CONCESSION AGREEMENT AS EXPLAINED IN THE NOTICE.

DRAYAGE SERVICES CONCESSION AGREEMENT FOR ACCESS TO THE PORT OF LOS ANGELES

AGREEMENT NO. _____

THIS DRAYAGE SERVICES CONCESSION AGREEMENT ("Concession") is made and entered into the _____day of _____, 20___, by and between the CITY OF LOS ANGELES, a municipal corporation, acting by and through its Board of Harbor Commissioners ("Port") and _____("Concessionaire"). Defined terms used and not otherwise defined herein shall have the meanings set forth in the Clean Air Action Plan Chapter of Port of Los Angeles Tariff No. 4 (Section 20).

For and in consideration of the promises, and of the terms, covenants and conditions hereinafter contained to be kept and performed by said parties, THE PARTIES HERETO DO MUTUALLY AGREE AS FOLLOWS:

I. DRAYAGE TRUCK CONCESSION RIGHTS GRANTED

(a) Subject to the terms of this Concession, including without limitation the terms set forth on the Schedules attached hereto and incorporated herein by reference, the Port hereby grants to the Concessionaire a non-exclusive license to access Port property for the purpose of transporting containers and/or other cargo to and from marine terminals ("Drayage Service"). Concessionaire's right of access to and use of the Port's facilities under this Concession shall be solely for the purpose of conducting Drayage Service unless the Concessionaire obtains the Executive Director's prior written permission to access Port's property for other purposes. Concessionaire's rights under this Concession shall be non-exclusive and the Port intends to grant similar concession rights to other concessionaires who meet and remain in compliance with Concession requirements. This Concession is not transferable without prior written permission from the Port, which shall be conditioned upon (1) satisfaction in full of the transferor Concessionaire's obligations to the Port, and (2) the proposed transferee's compliance with Concession qualifications and requirements. Concessionaire requests to transfer shall be delivered to the Port in writing at least 30 days' advance of any proposed substantial change in the

ownership and control of Concessionaire. The Port shall not unreasonably deny transfer of the Concession but may in its sole discretion choose to issue a new Concession in lieu of transfer. The Port shall not withhold consent to transfer the Concession to a wholly owned subsidiary of Concessionaire or to allow wholly owned subsidiaries of Concessionaire to operate under the rights granted by this Concession provided that such subsidiaries independently meet the requirements of a concessionaire. In the event that Concessionaire allows any wholly owned subsidiary to operate under the rights granted by this Concession, Concessionaire shall be legally liable to Port for all performance, payments, acts and omissions of such subsidiary related to this Concession.

(b) Drayage Trucks providing Drayage Service to the Port and operating under the authority of and in compliance with the terms and conditions of this Concession shall be referred to herein as "Permitted Trucks." Permitted Trucks may include Drayage Trucks leased or owned and operated by Concessionaire ("Concessionaire's Trucks") or, during the Transition Period (to the extent permitted in Section III (d) below), leased or owned by contractor drivers and performing Drayage Service on

behalf of Concessionaire under the authority of this Concession ("Contractors' Trucks"). Regardless of ownership status, Concessionaire shall cause all Permitted Trucks to comply fully with all of the terms and conditions of this Concession.

(c) Concessionaire understands that, by granting this Concession to the Concessionaire, the Port has not secured drayage service contracts between Concessionaire and any customers, which contracts and obligations therein shall remain the sole responsibility of Concessionaire.

II. TERM OF AGREEMENT

This Concession shall be effective for a term of five (5) years commencing at 12:01 a.m. on October 1, 2008 and terminating at 12:00 midnight on September 30, 2013.

III. CONCESSION REQUIREMENTS

As a condition to the right to provide Drayage Services under this Concession, Concessionaire shall comply with all of the requirements set forth below and on the Schedules attached hereto and incorporated herein by reference (collectively, the "Concession Requirements"):

(a) Licensed Motor Carrier. Concessionaire must be a licensed motor carrier in good

standing and in compliance with the requirements of a valid license/permit under either (1) a California Motor Carrier Permit issued by the California Department of Motor Vehicles under the California Vehicle Code, or (2) a state Motor Carrier Permit issued by another U.S. state, or (3) a Federal Motor Carrier License (USDOT Number) and Operating Authority (MC Number).

(b) Permitted Trucks. Concessionaire shall utilize Permitted Trucks (as defined in Section 1(b) above) to provide Drayage Service to the Port pursuant to this Concession. To qualify as a Permitted Truck, all Drayage Trucks providing Drayage Service operating under this Concession shall have required information entered into and kept updated in the Drayage Trucks Registry and shall comply at all times with Concession Requirements.

(c) Driver Compliance. Concessionaire shall be responsible for the compliance and performance of its drivers or other personnel utilized pursuant to this Concession.

(d) Driver Hiring. Concessionaire shall initially be permitted to utilize employees, independent contractor drivers (including without limitation owner operators), or a combination

thereof to achieve its full complement of drivers driving its Permitted Trucks. Concessionaire shall be granted a transition period, as set forth in the schedule below, by which to transition its Concession drivers to 100% Employee Concession drivers by no later than December 31, 2013 ("Transition Period"). During the Transition Period, Concessionaire shall meet the interim annual fourth quarter milestones set forth below for the percentage of its Employee drivers. "Employee" for the purpose of this Concession shall have the same meaning as under Section 3121(d) of Title 26 of the United States Code, and may include full-time, part-time, temporary or seasonal Employees to permit Concessionaire flexibility in driver staffing. The percentage of Concession drivers that are Employees during Employee Transition Period shall be calculated as a percentage of Employee drivers driving Permitted Trucks in Drayage Truck transactions at the Port's marine terminal gates based upon the proportionate number of such transactions by Employee drivers relative to those of non-Employees during the relevant time periods. Employee status data shall be collected electronically daily with each Permitted Truck transaction at the marine terminal gates. Reporting to both the Port and the Concessionaire will be

made quarterly, to enable Concessionaire to monitor level of compliance and make adjustments to maintain the annual fourth quarter average. Compliance measurement and reporting to both the Port and the Concessionaire will be done annually, using the simple arithmetic average of all records for the fourth quarter (October 1 through December 31). After December 31, 2012, all Concession drivers shall be Employees. Subject to drivers meeting Concessionaire's reasonable employment standards and all other qualifications being equal, Concessionaire shall give a hiring preference to drivers with a history of providing drayage services to the Port. The ultimate decision as to hiring shall rest with Concessionaire. When Concessionaire has openings for Drayage Truck drivers or administrative staff, Concessionaire shall post such job openings at the First Source Workforce Development Office, a workforce development program that provides prospective employee applicants through a non-exclusive job referral system. Concessionaire shall also consult the First Source list of prospective employee applicants prior to hiring.

EMPLOYEE DRIVER SCHEDULE - TRANSITION PERIOD

IMPLEMENTATION DATE Fourth Quarter (Oct. 1 - Dec. 31) Average Measured on Below Dates	% OF CONCESSION DRIVERS THAT ARE EMPLOYEES Fourth Quarter (Oct. 1- Dec. 31) Average Percentage
December 31, 2008	0%
December 31, 2009	20%
December 31, 2010	66%
December 31, 2011	85%
December 31, 2012	95%
December 31, 2013	100%

(e) Clean Truck Tariff. Concessionaire shall cause all Concessionaires' Permitted Trucks to be modernized by either retrofit or replacement to comply with the Clean Truck Program requirements in accordance with Section 20 of Port of Los Angeles Tariff No. 4. During the Transition Period (as defined in Section III(d)), Concessionaire shall confirm that all Contractors' Permitted Trucks that operate under its Concession also comply with the Clean Truck Program

requirements in accordance with Section 20 of Port of Los Angeles Tariff No. 4.

(f) Compliance with Truck Routes and Parking Restrictions. Concessionaire shall submit for approval by the Concession Administrator, an off-street parking plan that includes off-street parking location(s) for all Permitted Trucks. Concessionaire shall ensure that all Permitted Trucks are in compliance with on-street parking restrictions by local municipalities. Permitted Trucks not in service shall be staged off public streets and away from residential districts. Except when diverted by posted detours or at the direction of police, Port, or other traffic authorities, Concessionaire shall ensure that Permitted Trucks adhere to any truck routes specified by local and state authorities or the Port, including routes and permit requirements for hazardous materials, extra-wide, over-height and overweight loads.

(g) Truck Maintenance. Concessionaire shall prepare an appropriate maintenance plan for all Permitted Trucks. Concessionaire shall be responsible for vehicle condition and safety and shall ensure that the maintenance of all Permitted Trucks, including retrofit equipment, is conducted in accordance with

manufacturer's instructions. Maintenance records for all Permitted Trucks shall be available for inspection by the Concession Administrator during normal business hours or as previously arranged with Concessionaire.

(h) Compliance with Truck Safety and Operations Regulations. Concessionaire shall ensure that all Permitted Trucks are in compliance with all applicable existing regulatory safety standards. Concessionaire shall maintain and make available for inspection by the Concession Administrator, all records required for compliance with the Port's Clean Trucks Program and all existing regulatory programs including U.S. Department of Transportation motor carrier safety regulations, and State of California Biennial Inspection of Terminals program. This includes driver qualifications, driver training, vehicle maintenance, safety inspection, controlled substances and alcohol testing and hours-of-service for all employee drivers and contractor drivers to the extent permitted during the Transition Period under Section III (d).

(i) Driver Credential. Concessionaire shall ensure and keep records of enrollment in the Transportation Worker Identification Credential (TWIC) program, possession of a valid, current TWIC card and

ongoing compliance with the requirements of the TWIC program by all Concession drivers, including employees and contractor drivers to the extent permitted during the Transition Period under Section III (d).

(j) Compliance Tags. When entering and leaving Port Property and while on Port Property, Concessionaire shall ensure that each Permitted Truck is equipped with such means of Clean Trucks Program compliance verification as may be specified by the Marine Terminal Operators of the Port's Terminals.

(k) Security. To support the Port's safety and security measures, Concessionaire shall ensure that all Permitted Trucks comply with applicable Federal, State, Municipal and Port security laws and regulations, including without limitation, the USA Patriot Act of 2001, Maritime Transportation Security Act of 2002 and Department of Homeland Security regulations, including terminal and facility security plans. When entering and leaving Port Property and while on Port Property, Permitted Trucks shall be subject to safety and security searches in accordance with applicable law.

(l) Placards. When entering and leaving Port Property and while on Port

Property, Concessionaire shall post placards on all Permitted Trucks referring members of the public to a phone number to report concerns regarding truck emissions, safety and compliance to the Concession Administrator and/or authorities.

(m) Technology. When entering and leaving Port Property and while on Port Property, Concessionaire shall implement technology required for the Concession and/or the Clean Trucks Program. Port will consult with Concessionaires prior to requiring new technology.

(n) Financial Capability. Prior to approval of Concession application, Concessionaire has demonstrated to the satisfaction of the Executive Director that it possesses the financial capability to perform its obligations under this Concession over the term of the Agreement.

IV. ADDITIONAL CONCESSION REQUIREMENTS – SCHEDULES AND CONCESSION BULLETINS

The parties agree that this Concession is granted subject to all of the terms and conditions set forth in the Schedules which are attached to this Concession and incorporated herein by reference. In addition, the Port and/or the Concession Administrator(s) shall publish from time to time,

Concession Bulletins providing further detailed Concession procedures and information to Concessionaires.

Schedule 1 - Concessionaire Information
Schedule 2 - Concession Fees, Reporting and Audit Requirements
Schedule 3 – Indemnification and Insurance Requirements
Schedule 4 - Default and Termination

V. PROGRAM ADMINISTRATORS

The Port may designate one or more administrative agent(s) to administer the Clean Trucks Program and this Concession ("Program Administrators"). The Port shall provide written notice to Concessionaire of the designation of Program Administrator(s) and appropriate instructions regarding administrative policies and procedures to be handled by Program Administrator(s).

VI. COMPLIANCE WITH APPLICABLE LAWS

Concessionaire shall when entering and leaving Port Property and while on Port Property, comply with Port of Los Angeles Tariff No. 4 and all applicable federal, state and municipal laws, statutes, ordinances, rules and regulations that govern Concessionaire's operations, including without limitation, any laws, rules and regulations regulating motor carriers, transportation, hazardous materials, safety, security, employment, traffic, zoning and land use.

VII. INTEGRATION

This document constitutes the entire agreement between the parties to this Concession with respect to the subject matter set forth and supersedes any and all prior agreements or contracts on this subject matter between the parties, either oral or written. This Concession may not be amended, waived, or extended, in whole or in part, except in writing signed by all of the parties.

VIII. SEVERABILITY

Should any part of this Concession be determined by court or agency of competent jurisdiction to be unenforceable, unlawful, invalid, or subject to an order of temporary or permanent injunction from enforcement, such determination shall only apply to the specific provision and the remainder of this Concession shall continue in full force and effect.

IX. GOVERNING LAW / VENUE

This Agreement shall be governed by and construed in accordance with the laws of the State of California, without reference to the conflicts of law, rules and principles of such State. The parties agree that all actions or proceedings arising in connection with this Agreement shall be tried and litigated exclusively in the State or Federal courts located in the County of Los Angeles, State of California, in the judicial district required by court rules.

X. NOTICES

In all cases where written notice is to be given under this Agreement, service shall be deemed sufficient if said notice is deposited in the United States mail, postage prepaid. When so given, such notice shall be effective from the date of mailing of the same. For the purposes hereof, unless otherwise provided by notice in writing from the respective parties, notice to the Port shall be addressed to: Concession Administrator, P.O. Box 151, San Pedro, California 90733-0151, and notice to Concessionaire shall be addressed to it at the Business Address set forth in Schedule 1. Nothing herein contained shall preclude or render inoperative service of such notice in the manner provided by law.

XI. AFFIRMATIVE ACTION

Concessionaire, during the performance of this Agreement, shall not discriminate in its employment practices against any employee or applicant for employment because of employee's or applicant's race, religion, national origin, ancestry, sex, age, sexual orientation, disability, marital status, domestic partner status, or medical condition.

XII. WAGE AND EARNINGS ASSIGNMENT ORDERS/NOTICES OF ASSIGNMENTS

Concessionaire and/or any subcontractor are obligated to fully comply with all applicable state and federal employment reporting requirements for the Concessionaire and/or subcontractor's employees. Concessionaire and/or subcontractor shall certify

that the principal owner(s) are in compliance with any Wage and Earnings Assignment Orders and Notices of Assignments applicable to them personally. Concessionaire and/or subcontractor will fully comply with all lawfully served Wage and Earnings Assignment Orders and Notices of Assignments in accordance with Cal. Family Code Sections 5230 et seq. Concessionaire or subcontractor will maintain such compliance throughout the term of this Concession.

XIII. EFFECTIVE DATE

The Effective Date of this Concession shall be the last date of the execution dates of the signatories to this Concession, as indicated opposite their signatures below.

THE CITY OF LOS ANGELES, a municipal corporation, by and through its Board of Harbor Commissioners

Dated: _____

By _____
Executive Director

Attest _____
Secretary

_____
(CONCESSIONAIRE'S NAME),
a □ Corporation □ LLC □ Partnership
□ Sole Proprietorship □ Other

Dated: _____ By _____
(Print/Type Name and Title of Authorized Signatory)

Attest _____
(Print/Type Name and Title of Attesting Corp. Secretary or Officer)

APPROVED AS TO FORM

_____,20___
ROCKARD DELGADILLO, Los Angeles City Attorney.

By _____
(Assistant/Deputy)

SCHEDULE 1 - CONCESSIONAIRE'S INFORMATION

Concessionaire confirms to the Port that the following information is true and correct and shall immediately advise the Port in writing if any of such information changes or ceases to be true and correct. Concessionaire may also be required to update such information by data entry in the Drayage Truck Registry. Concession Registry and/or Driver Registry.

1.1 Legal Company Name and DBA:_____

1.2 Form of Entity and State of Incorporation/ Partnership/Domicile:

_____

1.3 Business Address:_____

_____

1.4 Telephone:_____Facsimile:_____

E-mail: _____

1.5 Licensed Motor Carrier Information:

Motor Carrier No.:_____

Department of Transportation No.:_____

Standard Carrier Alpha Code:_____

1.6 Tax ID No.:_____

SCHEDULE 2- CONCESSION FEES, REPORTING AND AUDITS

2.1 Concession Fees

2.1.1 A one time Concession fee of $2500 will be assessed to the Concessionaire. The Concession fee shall be collected at the time of submission of the Concession Application.

2.1.2 For each Permitted Truck, an annual fee of $100 will be assessed to the Concessionaire (Annual Truck Fees). The Annual Truck Fees will be collected (i) within 30 days of the Effective Date of this Concession for Permitted Trucks registered as of the Effective Date, (ii) within 30 days of registration of additional Permitted Trucks into the Drayage Truck Registry, and (iii) on the annual anniversary date that each Permitted Truck was registered in the Drayage Truck Registry (unless the Permitted Truck was registered prior to October 1, 2008 in which case its anniversary date shall be October 1). Trucks for which an annual fee has been paid for a particular year may be registered under multiple Port of Los Angeles Concessions without the payment of any additional annual fee of that year.

A Substitute Truck (a truck that specifically is substituted for a particular Permitted Truck that is removed from the Drayage Truck Registry by Concessionaire) shall not be subject to an additional annual fee for the year in which the substitution occurs. A Substitute Truck inherits the anniversary date of the truck it replaces.

2.1.3 These fees will be used to cover administrative costs of the Concession. Payments shall be made by Concessionaire in the form of a check or such other form of payment as directed in writing by the Port or Concession Administrator.

2.1.4 The failure of Concessionaire to pay the fees specified herein on time is a breach of contract for which the Port may terminate (according to the procedures set forth [in] Schedule 4 of this Concession[)], DEFAULT, TERMINATION AND WAIVER, or take such legal action hereunder as it deems necessary. The Port expects all fees to be paid on time and Concessionaire has agreed to pay on time.

2.1.5 No new or renewed Concession will be approved for a Concessionaire that has remaining unpaid balances under present or past Concessions, or has failed to submit required reports under the

present Concessions, or is in Default which is continuing and has not been cured to the satisfaction of the Port

2.2 Reporting Requirements

The Concessionaire shall be responsible to enter, update and maintain accurate data in the Drayage Truck Registry, Concession Registry and Driver Registry, and notify the Port or its designated agents within ten (10) business days of a change to any of the following information:

(a) Drayage Truck Registry information, including for each Drayage Truck in service under the Concession, the year, make and model, status of compliance with EPA standards and retrofit, and annual miles driven, and any other information required by the Concession Administrator
(b) Concessionaire Information (Schedule 1)
(c) Driver list and status of commercial driver's license, TWIC compliance and employee status
(d) Such other information related to the performance of this Concession as may reasonably be required by the Executive Directors and Concession Administrator

2.3 Periodic Reviews/Audits

Concessionaire agrees that while this Concession in is effect and for one year thereafter the Port, the Concession Administrator (or any other

agent designated by the Port) may inspect any property, offices or equipment utilized by the Concessionaire to perform Drayage Service, and any files or records which the Port believes may demonstrate the extent to which the Concessionaire has complied or has failed to comply with requirements set forth in this Concession.

SCHEDULE 3 – INDEMNIFICATION AND INSURANCE

3.1 Indemnity

Except to the extent of any negligence or willful misconduct of Port, Concessionaire shall at all times indemnify, protect, defend, and hold harmless the Port and any and all of its boards, officers, agents, or employees from and against all claims, charges, demands, costs, expenses (including reasonable counsel fees), judgments, civil fines and penalties, liabilities or losses of any kind or nature whatsoever which may be sustained or suffered by or secured against the Port, its boards, officers, agents, or employees by reason of any damage to property, injury to persons, or any action that may arise out of the performance of this Concession that is caused by any act, omission, or negligence of Concessionaire, its boards, officers, agents, employees, contractors, subcontractors or Permitted Trucks.

3.2 General Liability Insurance

Concessionaire shall procure and maintain in effect throughout the term of this Concession, without requiring additional compensation from the Port, commercial general liability insurance covering personal and advertising injury, bodily injury, and property damage providing contractual liability, independent contractors, products and completed operations, and premises/operations coverages within Concessionaire's normal limits of liability but not less than One Million Dollars ($1,000,000) combined single limit for injury or claim. Said limits

shall provide first dollar coverage except that Executive Director may permit a self-insured retention or self-insurance in those cases where, in his or her judgment, such retention or self-insurance is justified by the net worth of Concessionaire. The insurance provided shall contain a severability of interest clause and shall provide that any other insurance maintained by Port shall be excess of Concessionaire's insurance and shall not contribute to it. In all cases, regardless of any deductible or retention, said insurance shall contain a defense of suits provision. Each policy shall contain an additional insured endorsement naming the City of Los Angeles Harbor Department, its boards, officers, agents, and employees and a 30-day notice of cancellation by receipted mail as shown in Exhibit "3-A".

3.3 Automobile Liability Insurance

Concessionaire shall ensure that the following insurance is in force at all times during the term of this Concession for all Permitted Trucks: automobile insurance within Concessionaire's normal limits of liability but not less than $1,000,000 combined single limit per occurrence for transportation of all non-hazardous commodities, including oil and hazardous material in bulk and not less than $5,000,000 combined single limit for transporting hazardous substances in cargo tanks, portable tanks or hopper-type vehicles with capabilities in excess of 3,500 water gallons, or hazardous materials meeting specified hazard classes or divisions within the Hazardous Material Table (49 CFR 172.101). Each policy shall contain an additional insured

endorsement naming the City of Los Angeles Harbor Department, and its boards, officers, agents, and employees and an endorsement requiring 30 days' notice of cancellation by receipted mail as shown in Exhibit "3-B".

3.4 Workers' Compensation

Concessionaire shall certify that it is aware of the provisions of Section 3700 of the California Labor Code which requires every employer to be insured against liability for Workers' Compensation or to undertake self-insurance in accordance with the provisions of that Code, and that the Concessionaire shall comply with such provisions before commencing the performance of the tasks under this Concession. Concessionaire shall submit Workers' Compensation policies that meet current California statutory requirements, and $1,000,000 in employer's liability coverage, whether underwritten or by the state insurance fund or private carrier, which provide that the public or private carrier waives its right of subrogation against the Port in any circumstance in which it is alleged that actions or omissions of the Port contributed to the accident. See Exhibit "3-C".

3.5 Carrier Requirements

Except to the extent of any approved self-insurance, all insurance required by this Concession shall be placed with insurance carriers authorized to do business in the State of California and which are rated A-, VII or better in the Best's Insurance Guide. Carriers without a Best's rating shall meet

comparable standards in another rating service acceptable to the Port.

3.6 Notice of Cancellation

Each insurance policy described above shall provide that it will not be canceled or reduced in coverage until after the Risk Manager of the Port has been given 30 days' prior written notice by registered mail.

3.7 Evidence of Insurance

Concessionaire shall ensure that Special Endorsement forms, attached hereto as Exhibits 3-A, 3-B and 3-C, are submitted to the Program Administrator as evidence of all required insurance. Alternatively, a certified copy of each policy containing the additional insured and 30-day cancellation notice language shall be furnished to Concession Administrator. The form of such policy or endorsement shall be subject to the approval of the Risk Manager of the Port.

3.8 Renewal of Policies

Except to the extent of any approved self-insurance, at least 30 days prior to the expiration of each policy, Concessionaire shall furnish to Program Administrator a renewal endorsement or renewal certificate showing that the policy has been renewed or extended or, if new insurance has been obtained, evidence of insurance as specified above.

3.9 Right to Self-Insure

Upon written approval by the Executive Director, Concessionaire may self-insure if the following conditions are met:

1. Concessionaire has a formal self-insurance program in place prior to execution of this Concession. If a corporation, Concessionaire must have a formal resolution of its board of directors authorizing self-insurance.

2. Concessionaire agrees to protect the Port and the City, its boards, officers, agents and employees at the same level as would be provided by full insurance with respect to types of coverage and minimum limits of liability required by this Concession.

3. Concessionaire agrees to defend the Port and the City, its boards, officers, agents and employees in any lawsuit that would otherwise be defended by an insurance carrier.

4. Concessionaire agrees that any insurance carried by Port or the City is excess of Concessionaire's self-insurance and will not contribute to it.

5. Concessionaire provides the name and address of its claims administrator.

6. Concessionaire submits a Financial Statement or Balance Sheet prior to Executive Director's consideration of approval of self-insurance and annually thereafter evidence of financial capacity to cover the self-insurance.

7. Concessionaire agrees to inform Port in writing immediately of any change in its status or policy which would materially affect the protection afforded Port by this self-insurance.

8. Concessionaire has complied with all laws pertaining to self-insurance.

3.10 Accident Reports

Concessionaire shall report in writing to Executive Director within fifteen (15) calendar days after it, its officers or managing agents have knowledge of any accident or occurrence involving death or bodily injury to a person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident, or damage in excess of Two Thousand Five Hundred Dollars ($2500.00) to property, occurring upon Port property, or elsewhere within the Harbor District of the City of Los Angeles if Concessionaire's officers, agents, employees, contractors, subcontractors or Permitted Trucks are involved in such an accident or occurrence. Such report shall contain to the extent available (1) the name and address of the persons involved, (2) a general statement as to the nature and extent of injury or damage, (3) the date and hour

of occurrence, (4) the names and addresses of known witnesses, and (5) such other information as may be known to Concessionaire, its officers or managing agents.

EXHIBIT 3-A TO SCHEDULE 3
GENERAL LIABILITY INSURANCE FORM

EXHIBIT 3-B TO SCHEDULE 3
AUTO LIABILITY INSURANCE FORM

EXHIBIT 3-C TO SCHEDULE 3
WORKER'S COMPENSATION INSURANCE FORM

SCHEDULE 4 – DEFAULT AND TERMINATION

4.1 Default

In the event Concessionaire commits an event of Default (as defined in Section 4.2, below), such event shall be deemed a Default and the Port shall give Concessionaire written notice of such Default and the opportunity for the Concessionaire to cure or contest the Default as set forth in the notice in accordance with Sections 4.3 through 4.4 herein. If the Concession is terminated pursuant to Section 4.4 herein, the Port may deny any and all access to Port property by the Concessionaire except to permit Concessionaire to remove its property. In the event that the nature of the Default is such that it cannot be cured within the applicable cure period, Concessionaire must take substantial steps toward corrections within the cure period, and diligently continue efforts to complete the cure of the Default as soon as is reasonably practicable during which time the applicable remedy will not be imposed. In the event that a Notice of Default is issued by Port to Concessionaire, the provisions of Sections 4.3 and 4.4 below shall apply.

4.2 Events of Default

Circumstances that constitute a default under this Concession by Concessionaire ("Default") shall include, without limitation, the following:

(a) Any act or failure to act which operates to deprive Concessionaire any of the rights, powers, licenses, permits or

authorities necessary for the proper conduct and operation of Drayage Service in accordance with applicable laws;

(b) Any failure to comply with the terms and conditions of this Concession;

(c) Abandonment or discontinuance of Drayage Service for sixty (60) consecutive days;

(d) Repeated violations of traffic rules and regulations in and around the Harbor District or disregard of public safety;

(e) Any violation of the Patriot Act of 2001 or Department of Homeland Security regulations, including any facility security plan;

(f) Any fraud or misrepresentation in the Concession application, information or data submitted to the Port required under the Concession;

(g) Any effort to misrepresent that a Drayage Truck complies with Section 20 of Port Tariff No. 4, to disable or fail to maintain in proper operation emission-control equipment that has been installed in Drayage Trucks in Drayage Service, or any use of a Drayage Truck in Drayage Service that does not comply with Section 20 of Port Tariff No. 4;

(h) Any assignment or transfer of this Concession or substantial change in the ownership and control of Concessionaire that is not in accordance with Section 1(a) of this Concession;

(i) The bankruptcy of Concessionaire; or the appointment of a receiver for Concessionaire; or assignment of this Concession for the benefit of creditors; or

(j) The failure to pay or repeated late payment of fees due under Schedule 2, Concession Fees; or

(k) Violation of a Port Tariff, a City Ordinance, a State law, or a Federal law.

Any action by a Concessionaire's boards, officers, agents, employees, contractors, subcontractors or Permitted Trucks shall be deemed to be an action by Concessionaire for purposes of this Concession. If Concessionaire has undertaken obligations contained in truck-grant or other agreements, with the Port or with others, this Concession shall not affect such obligations contained in such other agreements.

4.3 Concession Enforcement Procedures

The following procedures shall apply in the event the Port issues a Notice of Default to Concessionaire.

4.3.1. The Executive Director, or any employee of the Port designated by the Executive Director, may issue a Notice of Default to a Concessionaire whenever there is reason to believe that the Concessionaire has breached this Concession or committed an event of Default

4.3.2. A Notice of Default shall be in writing, signed by the Executive Director or his/her designee, state in detail the nature of the Default, state the cure period and terms of cure, the Remedy that may be imposed if the Default is not cured within the time permitted and not properly contested as permitted herein, and shall be delivered by first class mail, overnight courier delivery or personal delivery to the business address provided by the Concessionaire in its Application, or to any officer of the Concessionaire.

4.3.3. A Notice of Default is an exercise of the Port's proprietorship of the Harbor District and of Port land and facilities and is not an action of the City of Los Angeles in its sovereign capacity. A Notice of Default and any Remedy imposed by a Notice of Default is independent of, and without prejudice to, any civil or criminal proceeding, claim, penalty, fine, sanction, or remedy that may be instituted or imposed by any governmental entity, including the City, by reason of the same Default giving rise to the Notice of Default.

4.3.4. A Notice of Default shall also state whether the Default is being designated by the Port as a Minor Default or a Major Default.

4.3.5. Minor Defaults

4.3.5.1. The Remedy stated in a Notice of Default which is designated by the Port as a Minor Default shall be effective and final thirty (30) calendar days after the Notice of Default is mailed or personally delivered, unless the Concessionaire has delivered a completed Notice of Contest to the Port, on a form for such a purpose, that it contests the Notice of Default within fourteen (14) calendar days.

4.3.5.2. If the Concessionaire has delivered a completed Notice of Contest under Section 4.3.5.1, the Executive Director will designate a person (the "Hearing Officer"), who did not sign the Notice of Default, to hold an Informal Hearing on the Notice of Default. At the Informal Hearing, the Port and the Concessionaire will present any relevant information and legal contentions with respect to the Notice of Default. The Informal Hearing shall be conducted informally under such procedures as may be designated by the Hearing Officer and any rules of evidence may be

dispensed with. The Decision of the Hearing Officer on the Notice of Default shall be final when rendered and shall include either upholding the Notice of Default and the Remedy stated therein or disallowing the Notice of Default. The Decision shall be in writing and signed by the Hearing Officer, but need not be accompanied by reasons or findings.

4.3.6. Major Defaults

4.3.6.1. The Remedy stated in a Notice of Default which is designated by the Port as a Major Default shall be effective and final sixty (60) calendar days after the Notice of Default is mailed or personally delivered, unless (i) the Concessionaire has delivered a completed Notice of Contest to the Port, on a form for such a purpose, that it contests the Notice of Default within thirty (30) calendar days, or (ii) the Notice of Default contains the finding set forth in Section 4.3.6.4, in which event the Remedy shall take immediate effect as provided in Section 4.3.6.4.

4.3.6.2. If the Concessionaire has delivered a completed Notice of Contest under Section 4.3.6.1, the Executive Director will designate a person (the "Hearing Officer"), who did not sign the Notice of Default, to hold an Informal Hearing on the Notice of Default. At the Informal Hearing, the Port and the Concessionaire will present any relevant information and legal contentions with respect to the Notice of Default. The Informal Hearing shall be conducted informally under such procedures as may be designated by the Hearing Officer and any rules of evidence may be dispensed with. A transcription or recording of the Informal Hearing shall be made. The decision of the Hearing Officer on the Notice of Default shall be final, except as stated in Section 4.3.6.3. The Decision shall include any of the following results: (a) upholding the Notice of Default and the Remedy stated therein; (b) upholding the Notice of Default but ordering a greater or lesser Remedy than stated in the Notice; or (c) disallowing the Notice of Default. The Decision shall be in writing, signed by the Hearing Officer, and shall briefly

state the Hearing Officer's reasons for the Decision.

4.3.6.3. The decision of the Hearing Officer under Section 4.3.6.2 shall be final unless either the Concessionaire or the Port staff, within ten (10) calendar days requests that the Decision be reviewed by the Executive Director. The Executive Director or his/her designee shall conduct the review based upon the record created before the Hearing Officer and such further arguments as may be ordered. The Decision upon review shall be in writing and shall contain the Remedy. The Decision upon review shall be final and whatever sanction is upheld thereby shall take effect ten (10) days after the Decision.

4.3.6.4. A Notice of Default which designates a Major Default may contain a finding that the Default constitutes a substantial risk of physical danger or injury to the Port, its customers or facilities, or persons or property at or near the Port. Such a Notice of Default may contain a Remedy that takes effect immediately upon issuance of the Notice and is intended to

prevent or lessen the risk of danger or injury. If such an immediate Remedy is contained in the Notice of Default, the Remedy shall take effect immediately and shall remain in effect pending the procedures contained in Sections 4.3.6.2 and 4.3.6.3. If the Concessionaire completes a Notice of Contest, the Port will endeavor to hold an Informal Hearing as expeditiously as possible.

4.4 Remedy

The potential Remedy will be contained in a Notice of Default and may be imposed by the Port for a breach of this Concession or other event of Default as follows:

4.4.1. For a Minor Default any one or more of the following may be contained in a Notice of Default as a Remedy and imposed by the Port:

(a) A warning letter;

(b) An order that corrective action be undertaken within a specified period of time;

(c) An order that the cost of investigation and administration of the Default be paid to the Port;

(d) An order that a course of education or training be

completed within a specified period of time.

4.4.2. For a Major Default any one or more of the following may be contained in a Notice of Default as a Remedy and imposed by the Port:

(a) Any Remedy provided for a Minor Default;

(b) An order suspending for a period not to exceed thirty (30) days the right of the Concessionaire to provide Drayage Services at the Port;

(c) An order of revocation of this Concession Agreement and of the right of the Concessionaire to provide Drayage Services at the Port.

4.4.3. For any Major Default in which there is a finding of willful or intentional fraud or misrepresentation of material information in the Concession application, information or data submitted to the Port required under the Concession, the Port may order the revocation of the Concession Agreement and of the right of the Concessionaire to provide Drayage Services at the Port, without the opportunity to cure the Default

4.4.4. The failure to comply with a Remedy imposed by the Port shall itself be grounds for a Notice of a Major Default.

PORT OF LOS ANGELES-TARIFF NO. 4

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and Circular No. 33A

SECTION TWO GENERAL RULES AND REGULATIONS- Continued	Item No.
UNLAWFUL TO FAIL OR REFUSE TO PAY TARIFF CHARGES Every person who fails or refuses to pay, or by false returns or in any manner avoids the payment of all or any portion of any charge for dockage, wharfage, wharf demurrage, wharf storage, or any other charge or fee which may be due to the Board from any source or cause, as provided for by this Tariff, is, in addition to the general penalties provided for in this Tariff, liable for and shall pay to the Board twice the amount of such charge or fee, and in addition, the sum of $100.00, except as may be otherwise specifically provided in this Tariff.	215
PENALTIES FOR VIOLATION * (a) It shall be unlawful for any person to utilize or make use of any wharf, landing, watercraft, facility, utility, structure, improvement or appliance under the jurisdiction of the Board, or to make use of the navigable waters of Los Angeles Harbor, without paying to said Board the proper toll, charge or fee therefor as may be fixed and	[C] + 220

specified in this Tariff and every person, firm or corporation violating any of the provisions of these Tariffs, respecting the payment of any such toll, charge or fee, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than One Thousand Dollars ($1,000.00), or by imprisonment in the County Jail for a period of not more than six months, or by both such fine and imprisonment, consistent with the Los Angeles City Municipal Code. * (b) It shall be unlawful for any person, firm or corporation to fail, refuse or neglect to comply with any of the provisions of the rules and regulations prescribed by this Tariff, and any person, firm or corporation violating any of the provisions of these rules and regulations shall be guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than Five Hundred Dollars, or by imprisonment in the County Jail for a period of not more than six months, or by both such fine and imprisonment. + Every violation of this Tariff is punishable as a misdemeanor unless provision is Otherwise made, and shall be punishable by a fine of not more than One Thousand Dollars ($1,000.00) or by imprisonment in the County Jail for a period of not more than six (6) months, or by both a fine and imprisonment.	

+ Every violation of this Tariff that is established as an infraction, or is charged as an Infraction, is punishable by a fine as set forth in this Tariff section, or as otherwise provided in this Tariff, not to exceed Two Hundred Fifty Dollars ($250.00) for each violation. + Each person shall be guilty of a separate offense for each and every day during any portion of which any violation of any provision of this Tariff is committed, continued or permitted by that person, and shall be punishable accordingly.	

See Item 10 for explanation of abbreviations and symbols.

Correction No. 449	Order No. 08-6965 Adopted June 19, 2008 Ordinance No. 180340 Adopted October 29, 2008	EFFECTIVE: December 15, 2008

RECOMMENDATION APPROVED AND ORDER NO. 08-6961 ADOPTED BY THE BOARD OF HARBOR COMMISSIONERS

May 15, 2008
Rose M. Dworshak
SECRETARY

LA
THE PORT OF OF LOS ANGELES
Executive Director's Report to the Board of Harbor Commissioners

DATE: **May 6, 2008**

FROM: **OPERATIONS BUREAU AND FINANCE & ADMINISTRATION BUREAU**

SUBJECT: **CLEAN AIR ACTION PLAN - CLEAN TRUCKS PROGRAM: (1) PORT OF LOS ANGELES DRAYAGE TRUCK CONCESSION AGREEMENT; (2) TEMPORARY ORDER AMENDING PORT OF LOS ANGELES TARIFF NO. 4 CLEAN TRUCK FEE**

SUMMARY:

The proposed action recommends that the Board of Harbor Commissioners approve two items to further implement the Clean Trucks Program: (1) Port of Los

Angeles Concession Agreement, and (2) temporary order to implement certain amendments to Los Angeles Tariff No. 4 to allow for immediate change in the date of commencement of collection of the Clean Truck Fee from June 1, 2008 to October 1, 2008.

RECOMMENDATIONS:

It is recommended that the Board of Harbor Commissioners:

1. Approve the form of Port of Los Angeles Concession Agreement set forth in Transmittal 1; and

2. Adopt a Temporary Order approving the amendment to Port of Los Angeles Tariff No. 4 (Transmittal 2). The form of the Tariff Amendment is the same as that which this Board previously approved by permanent Order on March 20, 2008 which is currently pending before the Los Angeles City Council.

3. Authorize the Board Secretary to certify to the adoption of this Order by the Board of Harbor Commissioners and cause the same to be published once in a daily newspaper printed and published in the City of Los Angeles.

BACKGROUND:

On November 20, 2006, the Los Angeles and Long Beach Boards of Harbor Commissioners (the "Boards") jointly approved the Clean Air Action Plan (the "CAAP"). A key component of the CAAP is the

Clean Truck Program (the "CTP"), which is being implemented in a phased approach by both the Port of Los Angeles and the Port of Long Beach (the "Ports") over the next five years. The CTP has been the subject of significant public outreach, including public workshops and stakeholder meetings, and significant discussion at Board meetings of the respective Ports.

In October 2007, as the first key step for moving forward with the CTP, the Boards approved tariffs that will result in substantial reduction in air pollution through the progressive ban of older, dirtier trucks calling at the Ports. The new tariffs require that by the year 2012 drayage trucks must meet USEPA 2007 heavy duty truck emissions standards to be allowed entry into terminals at either of the Ports. The tariffs allow this to be accomplished through truck emissions control retrofits or truck replacement.

In December 2007, the Boards continued their implementation of the CTP with approval of a tariff implementing a Clean Truck Fee (CTF) to help finance the retrofit or replacement of banned trucks. In addition, the Boards established a Clean Truck Fund to hold the monies collected under the CTF. At that time, the Boards directed staff to develop a Concession program for administration and operation of drayage trucks at both Ports. Principles considered in finalizing the Concession program included incentivizing the turnover of dirty trucks as rapidly as possible, ensuring sustainability, providing reliable drayage service, and enhancing efficiency and security. At that time, the Boards also

originally scheduled fee collection for the Clean Truck Fee to commence on June 1, 2008. However as discussed more fully in Section II below, since then, the Boards have enacted orders amending the tariff to move the collection commencement date from June 1, 2008 to October 1, 2008.

DISCUSSION:

I. PORT OF LOS ANGELES DRAYAGE TRUCK CONCESSION AGREEMENT

On March 20, 2008, the Board established a Concession program that specifies conditions that must be met in order to provide drayage services at Port of Los Angeles terminals. The objectives of the Concession program are to (a) create an orderly drayage market with an efficient, reliable supply of drayage services to the Port, (b) establish performance criteria for providers of drayage services that promote the Port's business objectives, (c) ensure attainment by Concessionaires and drivers of environmental goals of CTP, (d) ensure sufficient supply of drayage drivers, by improvement of wages, benefits, and working conditions, (e) enhance Port security and safety, and (f) reduce negative impacts on the local community.

Staff hereby recommends a Concession Agreement to implement the concession program. Key components of the Concession Agreement include:

- Each concessionaire is granted a five year renewable permit providing non-exclusive

access to conduct drayage services at Port of Los Angeles terminals;

- Each concessionaire must be a licensed motor carrier (LMC) in good standing and in compliance with the requirements of a valid license/permit under: (i) the State of California, (ii) another State in the U.S., or (iii) the Federal Government;
- Only drayage trucks that are: (i) [illegible] rating under the authority of an LMC concessionaire; (ii) registered by that LMC with the Ports' Drayage Truck Registry; and (iii) in compliance with the truck ban schedules will be allowed into Port of Los Angeles terminals;
- Concessionaires are initially allowed to use independent owner operators, employees or any combination thereof as drivers of drayage trucks under their authority. After a five year transition period, 100% of the drivers driving trucks used for drayage activity at the Port must be employees;
- Each concessionaire must provide an off-street parking plan for approval by the Port, and must assure its drivers comply with local parking restrictions for trucks, and adhere to all truck routes designated by the Port, and local and state authorities;
- Each concessionaire must provide an appropriate maintenance plan for approval by the Port, and the concessionaire is responsible to assure that each drayage truck operating under its authority is appropriately maintained, with maintenance records that can be inspected by the Port.

- Each Concessionaire is responsible to assure that all drayage trucks operating under its authority at Port of Los Angeles terminals comply with truck safety and operations regulations, including State and Federal truck inspection requirements, driver training, controlled substances and alcohol testing, and hours of service requirements.
- Each Concessionaire is required to assure that drivers operating trucks under its authority at Port of Los Angeles terminals have a valid Transportation Worker Identification Credential (TWIC).
- Each Concessionaire must assure that trucks operating under its authority at Port of Los Angeles terminals have a means of verification of compliance with concession requirements as they enter into terminals.
- Each Concessionaire must comply with Port safety and security measures, including Homeland Security and local terminal and facility security plans.
- Each Concessionaire must assure that trucks operating under its authority at Port of Los Angeles terminals each have placards on them with a Port designated phone number to allow the Port to follow up on citizen concerns regarding drayage truck operations and compliance with concession requirements.
- Each Concessionaire must agree to work with the Port of Los Angeles to implement technology and procedures designed to improve drayage operation efficiency and service.

The concession agreement is designed to facilitate achievement of important environmental, operational, safety and security objectives that the Board of Harbor Commissioners has set for the Port. These objectives have near term elements (replacement of older, "dirty" trucks over a period of five years), and longer term elements (creating a sustainable trucking market in which participants are incentivized and have the income to properly maintain and update their trucks with future new technologies) that must be achieved. The following important themes serve as the foundation of the approach that the Port of Los Angeles has established to develop this concession program and the recommended concession agreement.

LMC Accountability

Nearly all of the concession agreement requirements listed above establish that the LMC must be made accountable to the Port to assure that the drivers and trucks operating under its authority are in compliance with the concession program. For example, the LMC must make sure that the drivers have TWIC cards. The LMC must make sure the trucks are registered. The LMC is responsible to assure that there is parking available for the trucks when they are not in use. LMC accountability for these issues together with other LMC-accountable requirements contained in the concession agreement (e.g. safety inspections, continuing maintenance requirements, Homeland Security requirements) is designed to help transform the drayage marketplace from one where multiple participants can operate

with little oversight, to a safe, secure, sustainable and environmentally responsible system.

Employee Status and Transition

The need for LMC accountability to the Port, in turn leads to the need for LMCs to ask their drivers to be more accountable to them for their activities, and more predictable with their services. The Port of Los Angeles requirement that drivers transition to employee status is a necessary evolution of this reality. Employees are, by definition, more accountable for their actions than an independent contractor. Each Concessionaire will initially be allowed to use employees, independent contractor drivers, or a combination thereof to achieve its full complement of drivers driving its Permitted Trucks. But a transition period, based on the percentage of an LMC's gate moves that are handled by employees, is established to facilitate the transition.

Concessionaires must transition to having 100% of their gate moves at Port of Los Angeles terminals handled by employee drivers by calendar year 2013.

The employee transition period is roughly designed to follow the percentage of truck turn over due to the ban schedules, although the employee transition requirement for 2010 is deliberately not as sharp as the sharp increase in percentage of banned trucks that results from the January 1, 2010 ban date. The Port of Los Angeles estimates that the October 1, 2008 truck ban could affect up to 18% of the 16,800 regular drayage truck operators at the Ports. The next ban date, January 1, 2010, will affect another

80% of drayage trucks in operation, with the final ban date, January 1, 2012 affecting the remaining 1.5% of drayage trucks in operation. Instead of using the steep jump in percentages between 2008 and 2010, staff recommends more gradual increases as presented in the table below:

EMPLOYEE DRIVER SCHEDULE - TRANSITION PERIOD

IMPLEMENTATION DATE Annual Average Over Prior 12 Months Measured on Below Dates	% OF CONCESSION DRIVERS THAT ARE EMPLOYEES Annual Average Percentage
December 31, 2008	0%
December 31, 2009	20%
December 31, 2010	66%
December 31, 2011	85%
December 31, 2012	95%
December 31, 2013	100%

As shown, the percentage of gate moves that must be made by employee drivers is set at 0% for calendar year 2008, even though 18% of the trucks are affected by the October 1, 2008 ban. Instead, a requirement to have 20% of gate moves made by employees is set for calendar year 2009. This is

designed to give LMCs an initial adjustment period. Similarly, the impact of having 80% of trucks affected by the 2010 ban date is also spread over a three year period, with a requirement of only 66% of gate moves made by employees in 2010, and 85% in 2011, 95% in 2012 and 100% thereafter. Staff recommends that this gradual transition is a more feasible business model for LMCs.

The Port of Los Angeles believes that the accountability provided by the use of employees will reduce the number of trucks required and enhance efficiency by moving from the existing "one truck one employee" system to a system that will increase efficiency by allowing multiple drivers to drive trucks in shifts.

Efficiency and Technology Improvements

LMC accountability to the Port and more driver accountability to LMCs will create a system that can provide much better service to Port tenants. An important goal of the Port of Los Angeles is to better coordinate the movement of containers from terminals to their destinations. Coordination of movement of containers will produce less wasted truck moves, which the Port believes will reduce costs and produce less environmental impacts. The Port will ask each of its Concessionaires to agree to work with the Ports to develop technologies to track empty containers and match them with deliveries of loaded containers. Matching up these moves will help to make drayage routes more efficient and make each drayage operator more productive. Similarly, the Port will ask LMCs to help it determine how to

schedule deliveries and use employees in a way that will facilitate the use of trucks. This will cause a more efficient use of assets for LMCs and reduce the number of trucks needed to handle a given level of container volume, with consequent benefits in reducing pollution. In addition, improved efficiency will reduce costs for drayage and not only benefit the Port of Los Angeles, but it will benefit the drayage marketplace across the San Pedro Bay Ports.

San Pedro Bay Ports Concession Agreement Coordination

Development of this Port of Los Angeles Concession Agreement has occurred in coordination with the Port of Long Beach. Where ever possible, language for many provisions in the Port of Los Angeles Concession Agreement is identical to language of parallel provisions in the Port of Long Beach concession agreement. There remain a few obvious differences, but staff has made an effort to work with the Port of Long Beach to minimize these differences. Efforts are ongoing to coordinate development of the two Ports' concession programs, and there remains a desire to work with the Port of Long Beach on some of the key themes outlined above to assure ongoing collaborative movement toward achievement of important environmental, operational, safety and security objectives set forth in the CAAP.

The ports are also working together to ensure that the flow of cargo is not compromised by the implementation of the Clean Truck Program and the concession agreement. Operational issues such as procedures for dealing with non-drayage vehicles and

infrequent or one time visits are currently being developed. The ports are aware that despite all efforts exceptions will occur and that an efficient way to deal with these exceptions must be developed.

II. PROPOSED AMENDMENTS TO TARIFF NO. 4, SECTION 20 – CLEAN AIR ACTION PLAN AND SECTION 21 – CLEAN TRUCK FEE

This Board has previously approved, on March 20, 2008, a permanent order approving tariff amendments that would change the initiation date for collection of the CTF from June of 2008 to October of 2008. Because the permanent order is currently pending before, but has not yet been approved by, the Los Angeles City Council, staff recommends that the Board approve a temporary order be approved and put into effect at this time. The temporary order would allow the movement of collection of the CTF to occur immediately while the City of Los Angeles City Council considers that permanent order for this action that was approved by the Port of Los Angeles Board of Harbor Commissioners on March 20, 2008.

As described in the March 20, 2008 Board Report, the tariff currently requires that the truck fee be collected beginning on June 1, 2008. However, not all terminals have equipment and processes in place to assess the fee and are not required to have them in place before August 1, 2008. To give terminal operators time to install and test any necessary equipment, it is recommended that the commencement date for collection of the truck fee be extended to October 1, 2008. The deadlines for

phasing in cleaner trucks are not affected by this change and remain as originally adopted. This tariff change is also consistent with the amendment adopted by the Port of Long Beach in February 2008.

ENVIRONMENTAL ASSESSMENT:

The proposed action is an amendment to the Port's Tariff regarding Clean Truck Program (CTP). The amendment will provide an actual Concession Agreement as authorized by previous Board of Harbor Commissioner Activities on March 20, 2008. As such, the Director of Environmental Management has determined that the proposed action is exempt from the requirements of the California Environmental Quality Act (CEQA) under Sections 15273 (rates, fees and charges), 15301 (d) (replacement of equipment) and 15061 (b) (3) (no significant effect on environment) of the State CEQA Guidelines.

FINANCIAL IMPACT:

Approval of the proposed tariff amendments will have minimal financial impact on the Port. The financial impacts of adopting the Concession Agreement were cited in materials the Board considered in previously approving both the concession program. These included costs associated with the establishment and monitoring of a Concession Plan. In addition there will be initial and ongoing costs to establish and oversee the Concessionaire Program, the truck and driver database and the RFID system. A percentage of the

Clean Truck Fees collected by the port has been set aside to cover these costs.

ECONOMIC IMPACT:

The CTP and the resulting changes to the port drayage markets will have a number of economic effects on the 5-county region. The amount of employment generated by cargo handling is dependent on: the amount of cargo moving through the Port; the amount of direct employment required to move that cargo; and the wages paid, which get spent in the region and generate additional employment.

Most importantly, the CTP is necessary to allow the expansion of the Port of Los Angeles to meet expected increased cargo growth over the next 20 years. Port expansion will create roughly as many jobs for the 5-county region as the Port currently creates today. Without expansion, those jobs will not be created.

Driver wages will increase, due to the restriction of supply through enforcement of TWIC and by the mandate that drayage drivers be employees receiving benefits. These higher wages will lead to increased spending within the region, which will lead to increased regional employment.

As the industry becomes increasingly consolidated, there is also a one-time loss of jobs associated with the disappearance of small LMCs. However, the end of an LMC does not mean the loss of all the jobs associated with that LMC; rather than being lost,

most of those jobs simply shift over to the remaining larger LMCs. Dr. Husing provided a rough estimate in his report of approximately 1,500 jobs lost out of 5,300 (serving both the Port of Los Angeles and Port of Long Beach), but the ultimate number is dependent on the degree of consolidation seen in the industry.

Finally, there is the potential for strategic diversion, where cargo is shifted from the Port of Los Angeles not for economic reasons but to test the Port's commitment to the Clean Truck Program. Because this diversion is above that expected by an analysis of different ports' cost factors, it is difficult to estimate how much cargo could potentially be diverted. BCG suggested that it could be 15% of cargo. If this cargo is shifted to ports outside the region, then there would be greater short-term job loss. However, if the cargo is shifted to the Port of Long Beach, then this strategic diversion would have an impact on the Port of Los Angeles' revenue and on its terminal operators, but would not have an aggregate effect on regional employment.

CITY ATTORNEY:

The office of the City Attorney has reviewed and approved as to form, the Tariff and the Order.

TRANSMITTALS:

1. Port of Los Angeles Concession Agreement
2 Temporary Order, with Amendment to Tariff No. 4 as Exhibit A

/s/ John M. Holmes
JOHN M. HOLMES
Deputy Executive
Director, Operations

/s/ Molly Campbell
MOLLY CAMPBELL
Deputy Executive
Director, Finance &
Administration

APPROVED:

/s/ Geraldine Knatz
GERALDINE KNATZ, Ph.D.
Executive Director

JMH/MC

PORT OF LOS ANGELES – TARIFF NO. 4

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and Circular No. 41

SECTION TWENTY – Continued CLEAN AIR ACTION PLAN – GENERAL RULES AND REGULATIONS – Continued	Item No.
CLEAN TRUCK FEE 1. Beginning October 1, 2008, at 8:00 a.m., the following Clean Truck Fees shall be assessed: a. $35.00 on containers with an outside length of 20 feet or less; b. $70.00 on containers with an outside length of more than 20 feet. The Clean Truck Fee shall be assessed once, on containerized merchandise at the first point of entry to or departure from the Port of Los Angeles by Drayage Truck, with the exception of merchandise qualifying for the fee exemptions set for the in this Item 2030, paragraph 2. The Clean Truck Fee shall be paid by the cargo owner, notwithstanding anything to the contrary in Items 265 (c) or 265 (i) of this Tariff. 2. The Clean Truck Fee shall not be assessed on containerized merchandise that:	[C] + 2030

a. enters or leaves the Ports by Rail; b. moves between Terminals within the Ports; c. enters or leaves the Ports by Alternative Drayage Truck, or Legacy LNG Truck; d. enters or leaves the Port of Los Angeles by 2007 Drayage Truck registered in the DTR as purchased without Program Funds; or + e. is shipped under contract to the United States Transportation Command, United States Military or Department of Defense.	
CLEAN TRUCK FUND * The first Terminal Operator to handle any containerized merchandise subject to the Clean Truck Fee shall collect and remit the Clean Truck Fee to the Port of Los Angeles, and the monies shall be used by the Board of Harbor Commissioners exclusively for replacement and retrofit of Drayage Trucks and the rapid transition to 2007 Drayage Trucks serving the Ports of Los Angeles and Long Beach.	2035
See Item 10 for explanation of abbreviations and symbols.	

Correction No. 476	Order No. 08-6973 Adopted October 23, 2008 Ordinance No. 180679 Adopted May 5, 2009	EFFECTIVE: June 18, 2009

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and Circular No. 41

SECTION TWENTY – Continued CLEAN AIR ACTION PLAN – GENERAL RULES AND REGULATIONS – Continued	Item No.
CONCESSIONS * 1. Beginning October 1, 2008, at 8:00 a.m., no Terminal Operator shall permit access into any Terminal in the Port of Los Angeles to any Drayage Truck unless such Drayage Truck is registered under a Concession or a Day Pass from the Port of Los Angeles in the Drayage Truck Registry. * 2. The terms and conditions for the Concession are set forth in the Port of Los Angeles Concession Agreement between the Port of Los Angeles and the Licensed Motor Carrier. Copies of the Port of Los Angeles Concession Agreement and Concession Application are posted on the www.portoflosangeles.org website. Licensed Motor Carriers seeking to apply for a	[C] + 2040

Concession may also obtain information and an application for Concession or Day Pass from the Port of Los Angeles, Attention: Concession Administrator, 425 South Palos Verdes Street, San Pedro, CA 90731. The Concession Fee shall be $2,500 and the annual fee shall be $100 per Drayage Truck operating under the Concession (collectively the "Concession Fees"). The Day Pass Fee shall be $100 per Day Pass. Concession Fees and Day Pass Fees shall be paid by the Licensed Motor Carrier applying for or holding the Concession or Day Pass.	

See Item 10 for explanation of abbreviations and symbols.

Correction No. 467	Order No. 08-6971 Adopted August 21, 2008 Ordinance No. 180681 Adopted May 5. 2009	EFFECTIVE: June 20, 2009

ORDER NO. 6956

An Order of the Board of Harbor Commissioners of the City of Los Angeles amending the Port of Los Angeles Tariff No. 4.

FINDINGS

BACKGROUND

1. On July 12, 1989, the Board of Harbor Commissioners of the City of Los Angeles adopted Order No. 5837, which Order was approved by the City Council of the City of Los Angeles by Ordinance No. 165789, adopted on April 10, 1990. Said Order and Ordinance designated Port of Los Angeles Tariff No. 4, which sets forth rates at which, and terms under which, the Port of Los Angeles, California is willing to provide marine terminal services. Tariff No. 4 has been amended from time to time since 1989. The current version of Tariff No. 4 is made available to the public on the Port of Los Angeles website at www.portoflosangeles .org.

2. On November 1, 2007, the Board adopted Order No. 6935, which added Section 20, Items 2000 through 2025 to Tariff No. 4, relating to the San Pedro Bay Ports Clean Air Action Plan drayage truck measures. On December 20, the Board adopted Order No. 6943, adding to and amending these drayage truck measures. On January 14, 2008, the

Board adopted Order No. 6950, which added Section 21 to Tariff No. 4, relating to an infrastructure cargo fee. Board of Harbor Commissioners Orders Nos. 6935, 6943 and 6950 are each pending Los Angeles City Council action to adopt Ordinances approving said Orders.

3. The Board now wishes to further amend Port of Los Angeles Tariff No. 4 by amendment of Section 20, items 2000 through 2035, relating to the Clean Air Action Plan drayage truck measures, and Section 21, items 2100 through 2110, relating to the infrastructure Fee in order to implement the following actions: (a) require parties who access Port land and terminals for purposes of providing drayage services to the Port of Los Angeles to have a Concession Agreement with the Port of Los Angeles; (b) change the initiation date under item 2030 of Tariff No. 4 for collection of the Clean Truck Fee from June 1, 2008 to October 1, 2008; (c) provide cargo owners with incentives to use Concessionaires who have invested their own funds to purchase clean trucks, retrofits, and trucks that use alternative fuels, through exemptions from the Clean Truck Fee; and (d) conform the language contained in the Clean Truck Fee tariff set forth in Tariff No. 4, Section 20, to language in the Infrastructure Fee tariff set forth in Tariff No. 4, Section 21, for consistency of tariff terminology and fee collection from the cargo owners.

4. The San Pedro Bay Ports Clean Air Action Plan (CAAP) was adopted by the Boards of Harbor Commissioners of Long Beach and Los Angeles on November 20, 2006. The Ports of Los Angeles and Long Beach are located side-by-side in San Pedro Bay. In the CAAP, the two ports recognized that their ability to accommodate projected growth in international trade will depend on their ability to address adverse environmental impacts, and in particular, air quality impacts, that result from such trade. The CAAP was designed, in collaboration with the Federal Environmental Protection Agency (U.S. EPA), the California Air Resources Board (CARB) and the South Coast Air Quality Management District (SCAQMD), "to develop mitigation measures and incentive programs necessary to reduce air emissions and health risks while allowing port development to continue." CAAP, p. 2.

5. As part of the overall implementation of the CAAP, the Los Angeles Harbor Department ("Port of Los Angeles" or "Port"), in conjunction with the Port of Long Beach, has considered numerous proposals to address air pollution from a variety of sources operating within the Harbor District of the City of Los Angeles. This process has included public meetings, contacts with private and governmental parties at the local, state and federal level, and review of

written submissions and suggestions. This Ordinance reflects close consideration of all of these views.

6. The Port holds legal title to and manages the lands on which it is located as a trustee for the benefit of the People of California. The Port manages the land and tidal water resources associated with the trust under the Los Angeles Tidelands Trust (California Constitution Article X; California Public Resources Code Sec. 6306; Los Angeles City Charter, Article VI, and Chapter 676, Statutes of 1911, as amended) and the California Coastal Act (California Public Resources Code Div. 20, Sec. 30700 et. seq.), which identify the lands, waters and facilities as a primary economic and coastal resource of the State of California and an essential element of the national maritime industry for promotion of commerce, navigation, fisheries and harbor operations. As trustee, the Port also has a duty to mitigate the environmental impacts of activities on Port property and to preserve the ecology, including the water, land and surrounding air.

7. The Port is one of the largest providers of marine terminal facilities in the United States. The Port is proprietor of facilities that handle over 20% of the nation's containerized goods: cargo valued at more than $100 billion per annum. Together with the Port of Long Beach, the San Pedro Bay

ports handle over 40% of the nation's containerized goods worth more than $200 billion per annum. Failure to take prompt, reasonable, and effective measures to reduce harmful air emissions generated by Port-related activities will prevent the efficient expansion and development of port facilities necessary to meet the increasing demands of the nation's international maritime commerce.

8. Tens of thousands of individuals work in Port-related jobs, as employees of the Port and employees of businesses involved in moving, handling and shipping maritime cargo, spending many hours every day on the roads and rail lines in the port vicinity. As an employer and as a landlord, the Port has an interest in adopting reasonable measures to assure an efficient, safe and healthy workplace.

9. The Port is in competition with other West Coast, North American and global ports for international maritime commerce business. Just as business customers and users of the Port's facilities who are leaders in corporate social responsibility and sustainable practices seek modern, environmentally-friendly and sustainable port services, the Port has an interest in adopting reasonable measures to upgrade the infrastructure and to reduce harmful air emissions from Port-related goods movement operations.

10. As neighbor to millions of Californians, the Port has an interest in adopting reasonable measures to assure that Port operations do not injure the health and property of nearby residents. In addition, because the Port requires the support of residents in nearby communities for needed improvements in Port infrastructure, failure to significantly reduce the health and traffic impacts of Port operations on these communities will impede the Port's ability to handle increased volumes of goods in future.

11. Studies by SCAQMD and CARB have concluded that the more than two million people who live near the Ports of Los Angeles and Long Beach face greater health risks than those who live elsewhere in the region. Implementation of infrastructure projects, in conjunction with the other components of the CAAP, would contribute to the reduction in premature deaths and health costs in the region.

12. The South Coast Air Basin has the highest concentrations of atmospheric ozone and certain criteria pollutants in the entire United States. In the CAAP, the Ports of Los Angeles and Long Beach have committed to reduce pollutant emissions to the levels that will assure that port-related sources make their fair share of regional emission reductions to enable the South Coast Air Basin to attain state and federal ambient air quality standards. CAAP, p. 24.

13. If the South Coast Air Basin fails to comply with ambient air quality standards by federal Clean Air Act deadlines, the Port and other regional entities may be unable to obtain federal funding for future growth. If the Basin remains out of compliance beyond these deadlines, billions of dollars of federal funding for regional infrastructure improvements could be lost under federal conformity policies.

14. Independently, the failure of the Port to adequately address air pollution impacts and infrastructure capacity would threaten future Port growth both because of legal constraints under the California Environmental Quality Act (CEQA) and the National Environmental Policy Act and the opposition of surrounding residents and communities to further expansion without an actual improvement in environmental conditions surrounding the ports. For example, CEQA requires implementation of all feasible mitigation measures before any project with significant environmental impacts is approved.

15. Although the Port has unique trust responsibilities, the Port is not unique among large property owners or employers in recognizing the benefits of reducing pollution from its facilities, in enhancing the local infrastructure and the environment, promoting employment and living as good

neighbors with its surrounding communities. Reasonable environmental measures are simply good business practices.

PORT OF LOS ANGELES CONCESSION

16. Through the Clean Trucks Program, the Port of Los Angeles seeks to achieve the environmental, operational, and safety and security objectives of the Port. The CTP must meet environmental goals in both the near term (replacement of older, "dirty" trucks over a period of five years), and the longer term (creating a sustainable trucking market in which participants are incentivized and have the income to properly maintain and update their trucks with future new technologies). The Port has concerns about the current status of inefficient drayage truck operations and potential near term disruption to Port drayage operations as a result of anticipated loss of drivers due to the implementation of the Transportation Worker Identification Credential (TWIC). The Port also has concerns about the longer term need for a stable and reliable supply of trucks and drivers sufficient to service projected cargo growth to support international demand. Thus, the CTP must also ensure continuity of port operations and deliver a sufficient supply of both trucks and drivers to retain its important role in the national and regional economy. The CTP must also maintain and is intended even to

improve Port safety – both in terms of vehicle safety, by ensuring adequate vehicle maintenance, repair and replacement, and in terms of driver safety, through increased Licensed Motor Carrier responsibility for driver safety training and compliance.

17. The drayage at the Ports of Los Angeles and Long Beach is today comprised of a large number (approximately 16,000) of independent owner operators (IOOs) who contract with a large number (approximately 1,600) of Licensed Motor Carriers (LMCs) to provide drayage services. IOOs are paid by the drayage load and the majority of IOOs also provide trucking services in other markets outside the Port. The Port drayage services business is highly competitive and rates per drayage load are typically low, resulting in truck driver incomes that are insufficient to cover adequate truck maintenance. Many drayage truck drivers have testified at the Board of Harbor Commissioners meetings of both Ports of Los Angeles and Long Beach, stating that they are unable to afford and maintain the cleaner trucks needed to achieve air quality standards, even with the subsidies proposed to be offered by the Ports. Many drivers have also testified before the Boards of Harbor Commissioners that they earn relatively low incomes, in some cases $10-12 /hour, compared with the national truck driving average that is closer to $20 /hour or higher, and with truck diesel fuel prices

increasing, their net earnings are further reducing. This testimony has been supported by expert economist studies such as the work of Dr. John Husing and Dr. Kristin Monaco.

18. The situation, therefore, is not sustainable over the long term, and drayage trucks will continue to fall into disrepair so long as driver incomes remain inadequate to fund maintenance. This will have a negative effect on both the vehicle safety, as well as the air emissions performance of vehicle engines and retrofits, which must be regularly and properly maintained in order to sustain the improved emissions. The Port must address drayage sustainability if it is to receive the environmental benefit of its substantial investment in replacement trucks under the Clean Trucks Program.

19. As a result, the Board seeks to encourage evolution of the Port drayage market towards an asset-based market in which Licensed Motor Carriers that hold the motor carrier concessions also own the truck assets used to perform under the concession. This would be consistent with the other non-drayage trucking in Southern California or national market for trucking services in which higher driver incomes prevail.

20. Under the existing drayage trucking market structure certain economic costs of the drayage service business are externalized, and not paid for by the Licensed Motor

Carriers or the cargo owners, but often borne by IOO truck drivers, the Port, or the communities near the Port. Externalities that are borne by IOOs include, without limitation: the costs of underutilized capacity and inefficiency (e.g. idle time, troughs in demand, congestion on the freeways), and as a consequence IOOs are motivated to maximize the number of drays they can perform, threatening safety and violating hours-driven limits established by law. Externalities that are borne by the Port and local communities include, without limitation: the costs of air pollution and serious and expensive impacts on human health and premature death rates; the costs of congestion, and neighborhood ingress/egress and parking of trucks and the impact on traffic safety; the costs and complexity of ensuring vehicle safety (e.g. truck maintenance); and the costs security. On January 21, 2008, the Los Angeles Times reported in a story entitled, "Unsafe trucks stream out of L.A.'s ports," the alarming and illegal practice at the San Pedro Bay Ports of drivers who are unable to afford new tires paying to have new tread cut into their bald tires, creating safety hazards for themselves and the community who may encounter them on the road.

21. The Port currently has no business relationship with the thousands of trucks, drivers or licensed motor carriers dispatching their drayage services for the

Port's tenants and shipping customers. Yet, these parties access Port land and terminals, and negatively impact Port operations and the community through, among other impacts, substantial air pollution from drayage trucks. This pollution increases health risk and premature death. Port Pollution studies by the South Coast Air Quality Management District and the California Air Resources Board have quantified the economic impact on public health including premature death to be at a median of $5.9 Billion (range of $1.7-10.1 Billion) over a time period of 2008 – 2025.

22. In addition, Port drayage service presents security risks to the Port associated with the free movement of thousands of drayage drivers that currently handle Port cargo. Although the pending Transportation Worker Identification Credential (TWIC) program attempts to reduce security risk by limiting access in certain Port areas to credentialed workers, it focuses primarily on criminal background and immigration status review of individual TWIC card holders. The Port applies a layered security plan for the Harbor District and waters involving the cooperative efforts of international, federal, state, local and Port authorities. The Port has its own Port Police and security initiatives to protect and defend the Port from potential terrorism, theft, or other criminal activity. There have been reported cases of drivers presenting false credentials,

including counterfeit licenses, to gain access to Port terminals. There have also been reported instances of drivers carrying unauthorized passengers into Port terminals.

23. To achieve the Port's business objectives and address these issues, the Port shall establish a Port of Los Angeles Concession program (Concession) that specifies conditions that must be met in order to provide drayage services at Port of Los Angeles terminals. The objectives of the Concession program are to (a) further the improvement of air quality at the Port, (b) create an efficient, reliable supply of drayage services to the Port for the sustainable future, (c) establish performance criteria for providers of drayage services that promote the Port's business objectives, (d) ensure sufficient supply of drayage drivers, by improvement of wages, benefits, and working conditions, (e) enhance Port security and safety, and (f) reduce negative impacts on the local community. This program would be administered to assure ongoing compliance with CTP requirements without substantial disruption to the movement of cargo through the Port.

24. The proposed Concession program would specify that a drayage company must enter into a Drayage Truck Concession Agreement issued by the Port of Los Angeles in order to access the Port of Los Angeles. The Concession would have a term of five years,

subject to renewal under the then-existing terms of the Concession Plan.

CLEAN TRUCK FEE INITIATION DATE

25. Tariff No. 4 currently requires that the Clean Truck Fee be collected beginning on June 1, 2008. However, not all Port terminals have equipment and processes in place to assess the fee and are not required to have them in place before August 1, 2008. To give terminal operators time to install and test any necessary equipment, the commencement date for collection of the truck fee is extended to October 1, 2008.

CLEAN TRUCK FEE EXEMPTION

26. To create incentives for cargo owners to utilize Concessionaires who have invested private funds to replace dirty Port drayage trucks, and to encourage industry to replace Port drayage trucks with the cleanest possible trucks at the earliest possible date, the Port shall create two exemptions to the Clean Truck Fee:

    a. all privately funded clean diesel trucks, including retrofitted trucks, which meet 2007 California or USEPA standards
    b. all LNG, electric, alternative fuel or other acceptable "best

technology" (e.g. hybrid or hydrogen) trucks that meet 2007 California or USEPA standards

Nothing in this ordinance shall be deemed to constitute a permanent obligation on the part of the Port to exempt any truck from any generally applicable fee.

HARMONIZATION OF THE FEES

27. Since the truck and infrastructure tariffs were adopted in November 2007 and January 2008, the ports have continued planning for implementation of the tariffs and have continued discussions with interested parties. As a result of this process, several minor amendments to Tariff No. 4 Sections 20 and 21 are necessary to clarify and streamline these measures.

28. The intent of this Board in adopting the Clean Truck Fee and Infrastructure Fee (collectively, the "Fees") was that the ultimate consumers of the cargo should absorb the true cost of transporting that cargo without imposing health costs and other externalities on communities surrounding trade corridors. During the development of the truck fee, industry groups requested that a definition of the cargo owner be added which expressly excluded ocean common carriers and certain freight intermediaries. The ports broadened

the definition to provide equal treatment to other similarly situated freight intermediaries. The current definition of "beneficial cargo owner" in Section 20 of Tariff No. 4, while preserving neutrality between the various classes of freight intermediaries, adds considerable complexity and practical implementation issues. As a result, when the Board adopted the infrastructure fee, the Board did not follow the truck fee model and instead the infrastructure fee was imposed on "merchandise." The language used for the infrastructure fee is similar to that used in other port fees, such as dockage and wharfage, which have been successfully collected from cargo owners for many years. In order to harmonize the language of the truck and infrastructure fees, the definition of "beneficial cargo owner" is hereby deleted and the fee previsions amended to clarify that where the fees cannot be collected from the cargo owners, due to bankruptcy for example, the Port will not seek to recover the fees from the vessels that brought the cargo and related parties.

NOW, THEREFORE, THE BOARD OF HARBOR COMMISSIONERS OF THE CITY OF LOS ANGELES DOES HEREBY ORDER AS FOLLOWS:

Section 1. The Board of Harbor Commissioners of the City of Los Angeles hereby adopts the findings set forth above.

Section 2. The Port of Los Angeles Tariff No. 4, adopted July 12, 1989, by Order No. 5837, and Ordinance No. 165,789, adopted April 10, 1990, as amended, is further amended as set forth in Exhibit "A," attached hereto and incorporated herein by reference.

Section 3. The Director of Environmental Management has determined that these amendments to the Tariff are exempt from the California Environmental Quality Act (CEQA) as provided by the following sections of the State of California CEQA Guidelines in California Public Resources Code 21084, Title 14 of the California Code of Regulations, Section 15273 (rates, tolls, fares, and charges), Section 15301 (d) (restoration or rehabilitation of mechanical equipment) and Section 15061(b) (3) (no possibility of significant adverse effect on the environment). Infrastructure Projects proposed to be funded by the Infrastructure Fee shall only qualify for funding by the Infrastructure Fee after CEQA assessment and project approval by the applicable lead agency

Section 4. The Board Secretary shall certify to the adoption of this Order by the Board of Harbor Commissioners and shall cause the same to be presented to the City Council for consideration of its adoption by Ordinance.

Section 5. Pursuant to Charter Section 653(a), this amendment to the Tariff shall become effective when this Order is approved by the City Council by Ordinance; provided, however, pursuant to Charter Section 653(b), this Order shall be

effective prior to adoption by Ordinance for a period not to exceed 90 days from the date of its adoption.

I HEREBY CERTIFY THAT the foregoing Order was adopted by the Board of Harbor Commissioners of the City of Los Angeles at its meeting held on March 20, 2008

/s/ Rose M. Dworshak
ROSE DWORSHAK
Acting Board Secretary

Approved as to Form:

March 24, 2008
ROCKARD J. DELGADILLO, City Attorney

By /s/ Jov Crose
JOY CROSE
Assistant General Counsel

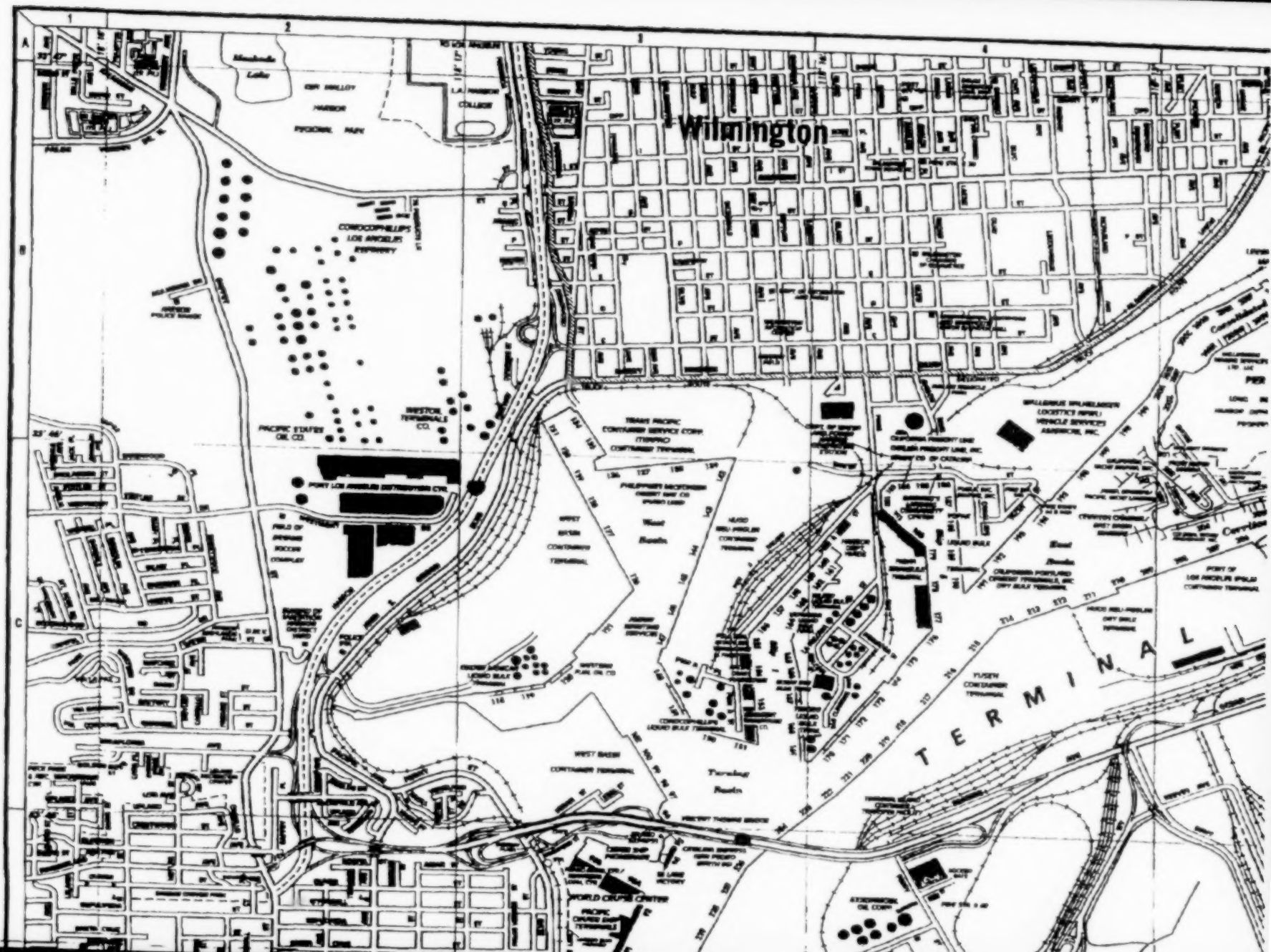
PORT OF LOS ANGELES – TARIFF NO. 4 Original Page.....Page 188	
SECTION TWENTY CLEAN AIR ACTION PLAN – GENERAL RULES AND REGULATIONS	Item No.
CLEAN TRUCK FUND The first Terminal Operator to handle any containerized merchandise subject to the Clean Truck Fee shall collect and remit the Clean Truck Fee to the Port of Los Angeles, and the monies shall be used by the Board of Harbor Commissioners exclusively for replacement and retrofit of Drayage Trucks serving the Ports of Los Angeles and Long Beach.	+ 2035
CONCESSIONS 1. Beginning October 1, 2008, at 8:00 a.m., no Terminal Operator shall permit access into any Terminal in the Port of Los Angeles to any Drayage Truck unless such Drayage Truck is registered under a Concession from the Port of Los Angeles in the Drayage Truck Registry. 2. The terms and conditions for the Concession are set forth in the Port of Los Angeles Concession Agreement between the Port of Los Angeles and the Licensed Motor Carrier. A copy of the Port of Los Angeles Concession Agreement shall be posted on the	+ 2040

www.portoflosangeles.org website on or after _____, 2008. Licensed Motor Carriers seeking to apply for a Concession may obtain an application for Concession on or after _____, 2008, from the Port of Los Angeles, Attention: Concession Administrator, 425 South Palos Verdes Street, San Pedro, CA 90731. The Application Fee shall be $2000, and the annual fee shall be $100 per Drayage Truck operating under the Concession (collectively the "Concession Fees"). Concession Fees shall be paid by the Licensed Motor Carrier applying for or holding the Concession.	

See Item 10 for explanation of abbreviations and symbols.

	Order No. Adopted Ordinance No. Adopted	EFFECTIVE:

Trial Demonstrative Ex. 2,
Map of Los Angeles
& Long Beach Harbors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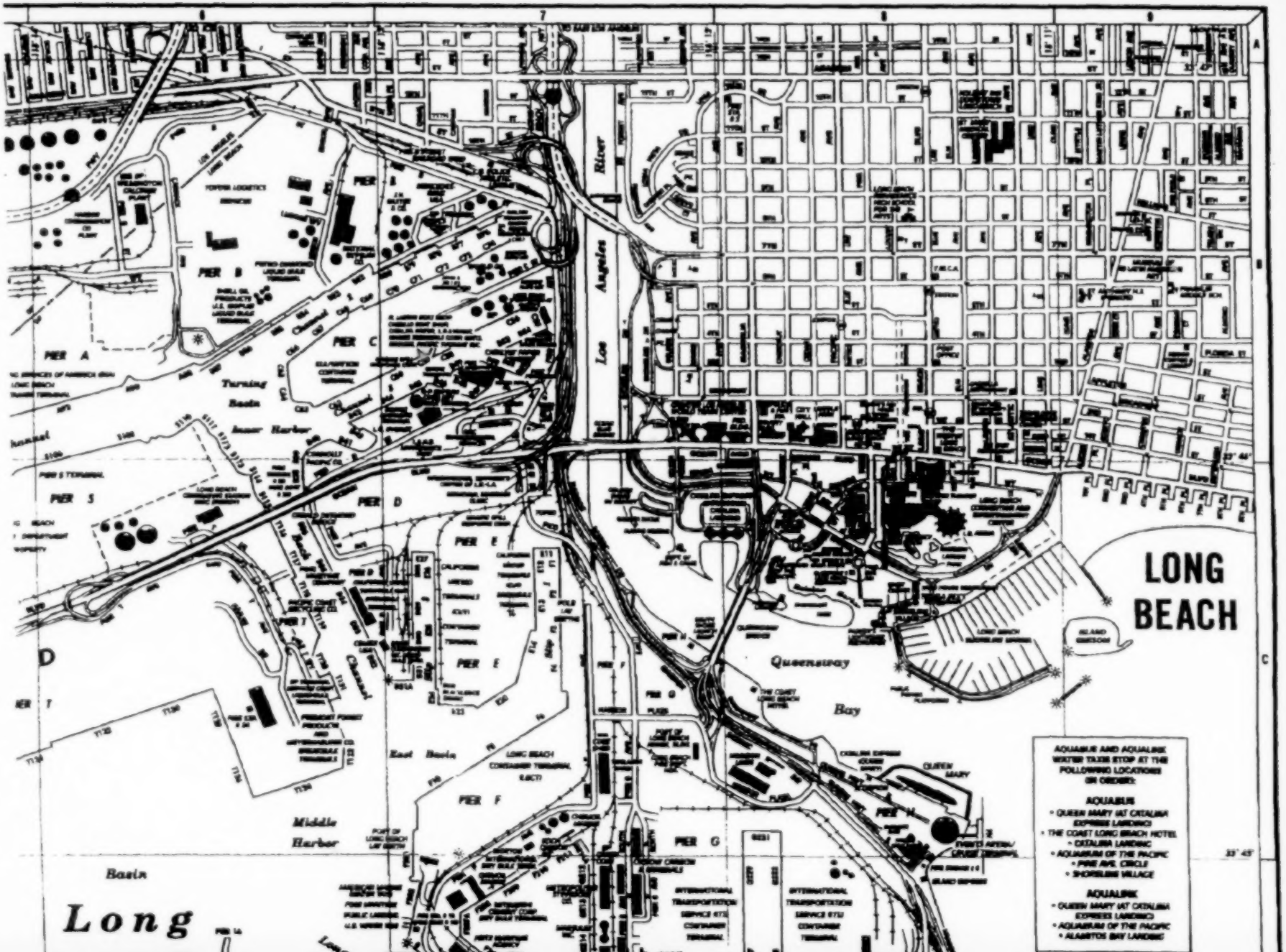
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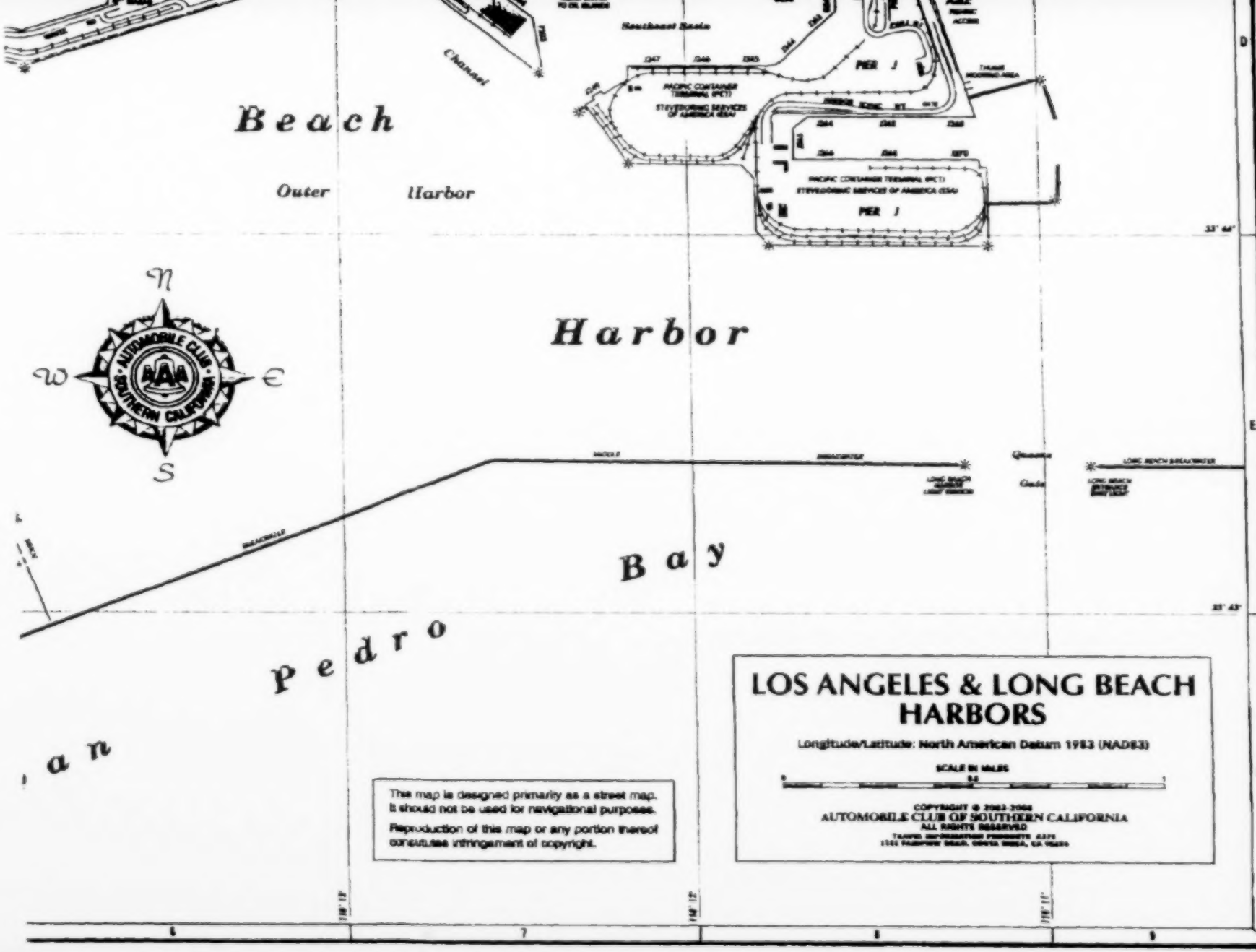
QUEEN MARY
AQUABUS AND AQUALINK WATER TAXIS STOP AT THE FOLLOWING LOCATIONS ON ORDERS:
AQUABUS
• QUEEN MARY (AT CATALINA EXPRESS LANDING)
• THE COAST LONG BEACH HOTEL
• CATALINA LANDING
• AQUARIUM OF THE PACIFIC
• PINE AVE. CIRCLE
• SHORELINE VILLAGE
AQUALINK
• QUEEN MARY (AT CATALINA EXPRESS LANDING)
• AQUARIUM OF THE PACIFIC
• ALAMITOS BAY LANDING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LOS ANGELES & LONG BEACH HARBORS
Longitude/Latitude: North American Datum 1983 (NAD83)
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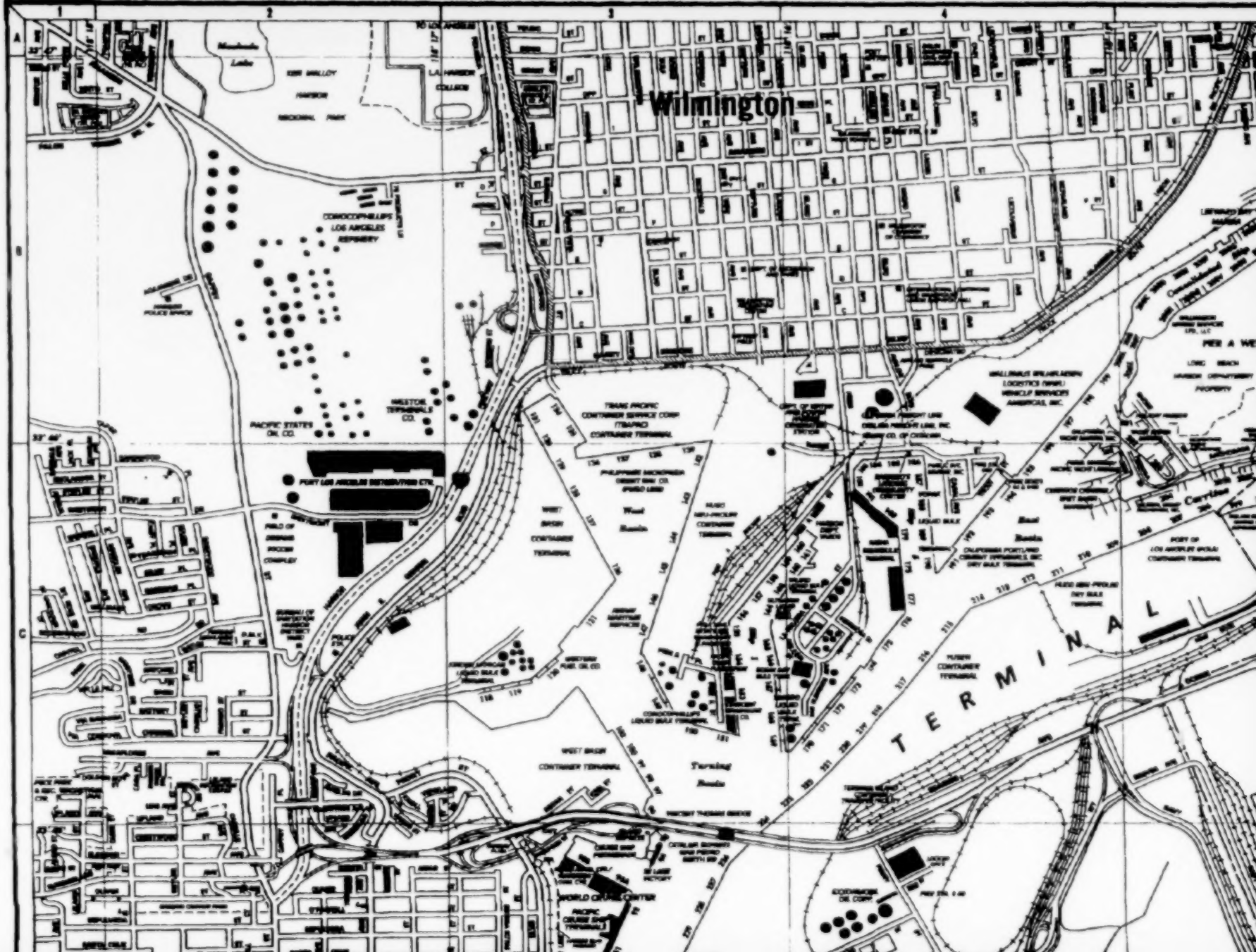
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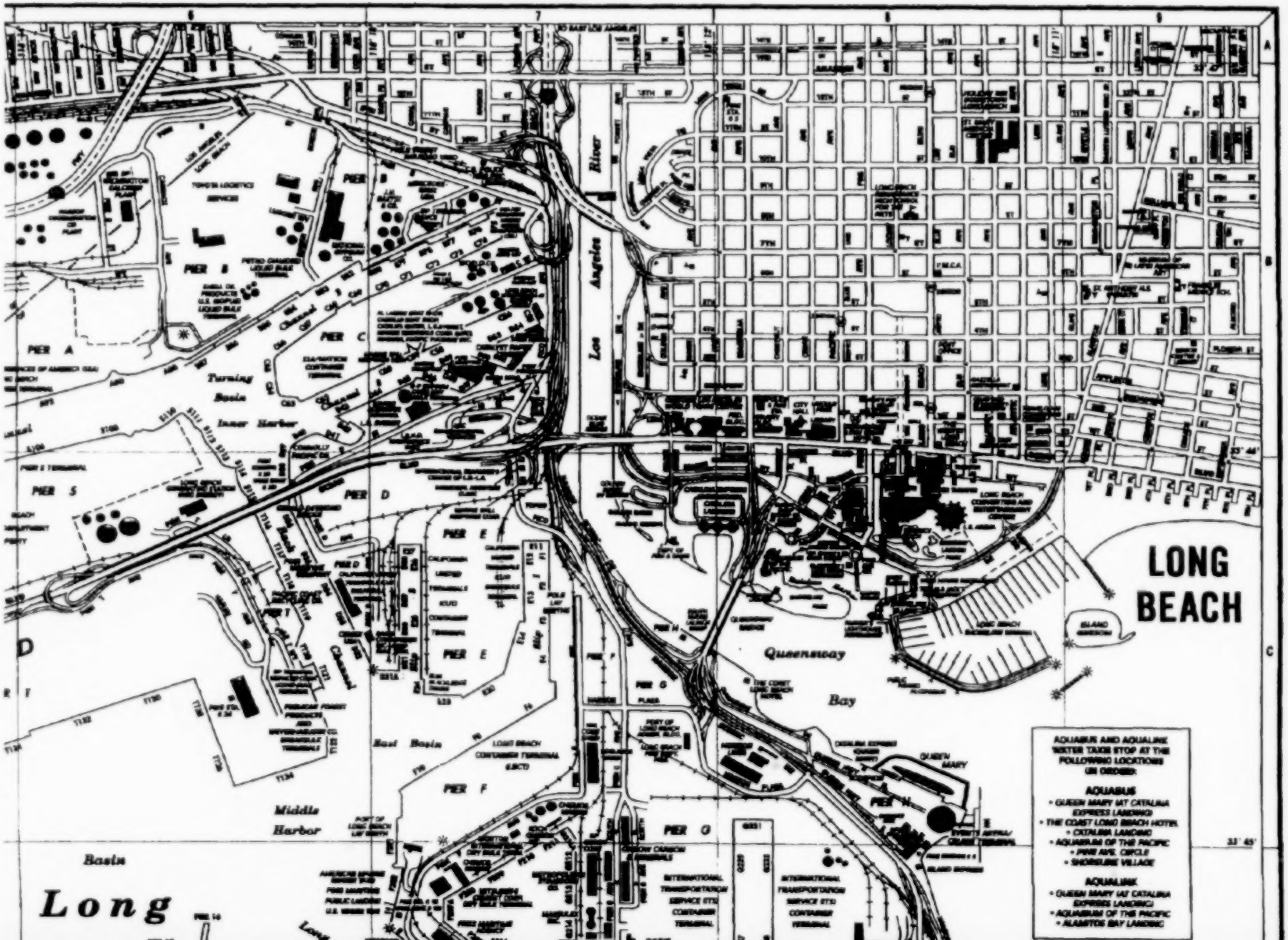
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Beach
Outer Harbor
Harbor
Bay
San Pedro
Channel
Southeast Basin
PIER J
PACIFIC CONTAINER TERMINAL (PCT)
STEVEDORING SERVICES OF AMERICA (SSA)
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PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
FEB 15 2013
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 11-798

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Title 49 U.S.C. § 14501(c)(1), originally enacted as a provision of the Federal Aviation Administration Authorization Act of 1994, provides that "a State [or] political subdivision . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." It contains an exception providing that the express preemption clause "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." *Id.* § 14501(c)(2)(A). The questions presented are:

1. Whether an unexpressed "market participant" exception exists in Section 14501(c)(1) and permits a municipal governmental entity to take action that conflicts with the express preemption clause, occurs in a market in which the municipal entity does not participate, and is unconnected with any interest in the efficient procurement of services.

2. Whether permitting a municipal governmental entity to bar federally licensed motor carriers from access to a port operates as a partial suspension of the motor carriers' federal registration, in violation of *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954).

RULE 14.1(b) STATEMENT

Petitioner is the American Trucking Associations, Inc., plaintiff-appellant below.

Respondents are the City of Los Angeles, the Harbor Department of the City of Los Angeles, and the Board of Harbor Commissioners of the City of Los Angeles, all defendants-appellees below, and Natural Resources Defense Council, Sierra Club, and Coalition for Clean Air, Inc., all defendants-intervenors-appellees below.

RULE 29.6 STATEMENT

Petitioner has no parent companies or non-wholly-owned subsidiaries.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals, as amended October 31, 2011 (Pet. App. 1a-58a), is reported at 660 F.3d 384. The opinion of the district court (Pet. App. 59a-137a) is unreported. The earlier opinions of the court of appeals in connection with petitioner's request for a preliminary injunction (Pet. App. 138a-148a, 207a-238a) are reported at 596 F.3d 602 and 559 F.3d 1046. The district court opinions issued in connection with the preliminary injunction (Pet. App. 149a-206a, 239a-272a) are unreported.

JURISDICTION

The court of appeals' judgment was entered on September 26, 2011. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Supremacy Clause of the Constitution and of the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501 *et seq.*, are reproduced at Pet. App. 273a-279a.

STATEMENT

In 2008, the Port of Los Angeles set out to transform the market for motor carrier services at what was then, and is now, the busiest container port in the United States. Adopting what amounts to a comprehensive licensing scheme, the Port required each motor carrier serving terminal operators at the Port to enter into a "Concession Agreement" with the Port governing everything from the maintenance by

motor carriers of trucks serving the Port, to the locations where trucks could be parked when not in service at the Port, to the organization of the motor carriers' work force. The Port enforced its new concession requirements in two ways. The Port amended its tariff to impose a penally enforceable prohibition on terminal operators doing business with motor carriers that had not agreed to the Port's requirements. And it included within the concession agreements themselves remedial provisions purporting to grant the Port the right to take actions up to and including revoking a motor carrier's authority to operate at the Port in the event the carrier committed a "default" under the concession.

The Port's actions would plainly be preempted had it imposed the same conditions as part of a licensing scheme. Yet the Port seeks to escape preemption by imposing conditions on the provision of motor carrier services here through what it has termed a concession agreement rather than a license. The form the requirements take makes a difference, the Port argues, citing the "market participant" doctrine developed in this Court's Commerce Clause cases. This case therefore poses the question whether any such exception exists under a statutory scheme expressly preempting states from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier," 49 U.S.C. § 14501(c)(1). If so, this case presents the question whether such an exception, properly construed, could save the Port's attempt here to impose conditions on a market in which it does not seek to procure goods or services. And, because the Port asserts authority to enforce the concession requirements by suspending or revoking a motor carrier's authority to

operate at the Port, this case also poses the question whether a municipal governmental entity may impose such a remedy on a federally licensed motor carrier, in conflict with longstanding precedent of this Court.

A. The Federal Aviation Administration Authorization Act of 1994

The trucking industry has for almost two decades operated under a comprehensive deregulatory regime at the federal and state levels. Deregulation at the federal level came first, through enactment of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. That Act displaced a body of pervasive federal regulation of the interstate trucking industry under the Motor Carrier Act of 1935, Pub. L. No. 74-255, 49 Stat. 543, streamlining the federal regulatory scheme (but leaving in place federal authority to issue motor carriers certificates to operate in interstate commerce).

In 1994, Congress passed the Federal Aviation Administration Authorization Act (FAAAA) to preempt States from counteracting this deregulatory federal policy through the introduction of a multiplicity of state and local regulation. As Congress noted in express findings within the Act, expansive preemption was required because even state regulation of *intrastate* transportation of property "(A) imposed an unreasonable burden on interstate commerce; (B) impeded the free flow of trade, traffic, and transportation of interstate commerce; and (C) placed an unreasonable cost on the American consumers." FAAAA, Pub. L. No. 103-305, § 601(a)(1)(A)-(C), 108 Stat. 1569 (1994). To remove those impediments to interstate commerce,

Congress enacted a broad preemption clause, modeled on the equally expansive preemption clause of the Airline Deregulation Act (ADA) of 1978. Pub. L. No. 95-504, 92 Stat. 1705. That Act had, for the airline industry, combined deregulation at the federal level with expansive preemption of state and local regulations to "ensure that the States would not undo federal deregulation with regulation of their own." *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008) (quoting *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)). Congress copied the language of the ADA "fully aware" of the broad preemption interpretation that language had been given by this Court in *Morales*. *Id.* at 370 (citing H.R. Conf. Rep. No. 103-677, at 83, 85 (1994)).

The FAAAA therefore provides that "a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1). The Act expressly addresses vehicle identification requirements, providing that "[n]o State, political subdivision of a State, interstate agency, or other political agency of two or more States may enact or enforce any law, rule, regulation standard, or other provision having the force and effect of law that requires a motor carrier . . . to display any form of identification on or in a commercial motor vehicle . . . , other than forms of identification required by the Secretary of Transportation." *Id.* § 14506(a).

B. The Port's Mandatory Concession Agreements

Petitioner, the American Trucking Associations, Inc. (ATA), is a nonprofit national trade association for the trucking industry, with its membership including motor carriers providing drayage services at the Port. Pet. App. 67a. Drayage providers are federally licensed motor carriers (LMCs)[1] that contract with ocean carriers, cargo owners, or others in the transportation chain to transport cargo between marine terminals and customers or other avenues for further transport such as off-Port long-distance trucks and railheads. *Id.* at 6a, 71a-72a.

In November 2006, the Board of Harbor Commissioners for the Port of Los Angeles decided, in conjunction with the physically contiguous Port of Long Beach, to adopt a "Clean Air Action Plan." That plan was designed to reduce emissions relating to the Port's activities through, among other things, changes in the ways drayage services were provided by the Port. Pet. App. 79a-80a.

The Port is, by cargo volume, the largest port in the United States, handling more than $240 billion in cargo in 2007. Indeed, considered with the Port of Long Beach, the Port of Los Angeles was the fifth busiest port in the world by cargo volume in 2007. Pet. App. 69a. Formally organized as the Los

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[1] The Secretary of Transportation registers motor carriers to operate in interstate commerce. 49 U.S.C. § 13902. The Secretary must find, among other things, that the carrier is "willing and able to comply with" safety regulations imposed by the Secretary, safety fitness requirements established under *id.* § 31142, and minimum financial responsibility requirements established under *id.* §§ 13906, 31138, and 31139.

Angeles Harbor Department, the Port is a department of the City of Los Angeles, managed by the Board of Harbor Commissioners. *Id.* at 67a-68a. The Port operates as a landlord port: rather than operate terminal facilities itself, it develops those facilities and then leases them to marine terminal operators. *Id.* at 71a.

In the past, LMCs frequently provided drayage services by contracting with independent owners and operators of the drayage trucks at the Port. Before the actions giving rise to this litigation, drayage providers had never had to enter into any contract or lease with the Port to provide services. Pet. App. 84a.

In November 2007, the Board of Harbor Commissioners approved the first step of a "Clean Truck Program," amending the Port's Tariff No. 4 to put in place a progressive ban on older trucks providing drayage services at the Port. Pet. App. 82a-83a. In March 2008, the Board amended the Tariff again, this time to impose a requirement that, beginning on October 1, 2008, all motor carriers seeking to provide drayage services at the Port sign a mandatory concession agreement. *Id.* at 84a. In its order instituting the new requirement, the Board concluded that it was necessary because "[u]nder the existing drayage trucking market structure certain economic costs of the drayage service business are externalized, and not paid for by the Licensed Motor Carriers or the cargo owners, but often borne by [independent] truck drivers, the Port, or the communities near the Port." JA116-117.

The Board subsequently issued form "contracts" setting out the terms of the mandatory concession agreement. As the Port's Operations and Finance &

Administration Bureaus noted, the "LMC-accountable requirements contained in the concession agreement" are "designed to help transform the drayage marketplace from one where multiple participants can operate with little oversight, to a safe, secure, sustainable and environmentally responsible system." JA93-94. Among the numerous "Concession Requirements" imposed by the Port were requirements (1) that motor carrier providing drayage services at the Port transition over five years to "100% Employee Concession drivers" in place of independent contractor drivers (the "employee-driver provision"), JA46; (2) that the motor carrier "submit for approval by the Concession Administrator, an off-street parking plan that includes off-street parking location(s) for all Permitted Trucks" (the "off-street-parking provision"), JA49; (3) that the motor carrier "prepare an appropriate maintenance plan for all Permitted Trucks" and "ensure that the maintenance of all Permitted Trucks . . . is conducted in accordance with manufacturer's instructions" (the "maintenance provision"), JA49-50; (4) that, "[w]hen entering and leaving Port Property and while on Port Property," the motor carrier "post placards on all Permitted Trucks referring members of the public to a phone number to report concerns regarding truck emissions, safety and compliance to the Concession Administrator and/or authorities" (the "placard provision"), JA51-52; and (5) that the motor carrier "demonstrate[] to the satisfaction of the Executive Director that it possesses the financial capability to perform its obligations under this Concession" (the "financial-capability provision"), JA52.

The mandatory concession agreement provides that, among other things, "[a]ny failure to comply

with the terms and conditions of this Concession" constitutes a default that, if not timely cured, would permit the Port to treat the concession agreement as terminated. JA74. In the event of such a termination, the Port "may deny any and all access to Port property" to the defaulting motor carrier. JA73. Moreover, any violation of the concession requirements—which are incorporated into Tariff No. 4—can give rise to criminal penalties, including fines and imprisonment. JA84-86.

C. Prior Proceedings in This Case

Following the adoption of the Port's novel concession-agreement requirement, Petitioner filed a complaint against Respondents the City of Los Angeles, the Harbor Department of the City of Los Angeles, and the Board of Harbor Commissioners of the City of Los Angeles.[2] The complaint alleged that the mandatory concession agreements were preempted by the Supremacy Clause of the United States Constitution and Section 14501(c) of the FAAAA.

Petitioner sought a preliminary injunction in connection with the preemption-related counts of its complaint. Respondents defended the imposition of the concession agreements on three principal grounds. First, they claimed that, because the Port was located on "sovereign tidelands," any

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[2] Petitioner also initially filed suit against the City of Long Beach, the Harbor Department of the City of Long Beach, and the Board of Harbor Commissioners of the City of Long Beach, challenging a similar but not identical concession plan imposed by the Port of Long Beach. See Pet. App. 242a-243a. Petitioner and the Long Beach defendants settled during the preliminary injunction proceedings in this litigation. *Id.* at 7a n.5.

requirements imposed by the concession agreements are exempted from preemption. Pet. App. 249a. Second, they claimed that the concession agreements fall within a "market participant" exception to preemption under the FAAAA. *Ibid.* Finally, they claimed that the concession agreements fall within the FAAAA's express exception to preemption for state and local regulations passed under the "safety regulatory authority of a State with respect to motor vehicles," 49 U.S.C. § 14501(c)(2)(A). Pet. App. 249a.

The district court concluded that the concession agreements likely fall within the FAAAA's preemption clause. It also concluded, initially, that neither the Port's location on "sovereign tidelands" nor any "market-participant" exception insulates the Port's actions from FAAAA preemption. Pet. App. 250a-252a, 254a-261a. But, the court concluded, the requirements imposed by the concession agreements fall within the statutory safety exception. *Id.* at 262a-266a.

On appeal, the Ninth Circuit unanimously held that the district court had erred in failing to recognize that "the mere fact that one part of a regulation or group of regulations might come within an exception to preemption does not mean that all other parts of that regulation or group are also excepted." Pet. App. 225a. It noted that the preliminary injunction record included evidence of several other purposes for the concession agreements beyond simply addressing vehicle safety, including "an extensive attempt to reshape and control the economics of the drayage industry in one of the largest ports in the nation." *Id.* at 225a-226a. Finding it "likely that many of those provisions are preempted," *id.* at 229a, the Ninth Circuit remanded

to allow the district court to consider whether the concession agreement was preempted in its entirety or only in part. *Id.* at 237a.

On remand, the district court enjoined the employee-driver, financial-capability, and off-street-parking provisions. It denied a preliminary injunction against the maintenance and placard provisions, concluding that they fall within the FAAAA's safety exception. Pet. App. 204a-205a. On a subsequent appeal, the Ninth Circuit reversed the district court again with respect to the placard provision, holding that the provision was likely preempted by the preemption clause of 49 U.S.C. § 14506(a), which includes no safety exception. Pet. App. 144a.

Following the preliminary-injunction proceedings, the district court conducted a bench trial. The court held that none of the challenged provisions of the concession agreement is preempted. Rejecting ATA's argument that all of the concession agreement requirements are *per se* "related to a price, route, or service" of a motor carrier, the district court held that the maintenance, placard, and financial-capability provisions do not fall within the Act's preemption clause, Pet. App. 101a-104a, while concluding further that the maintenance and placard provisions fall within the FAAAA's express exception for safety regulation, *id.* at 109a-110a.

The district court further held that the market-participant doctrine *also* saved from preemption each of the five challenged provisions of the concession agreement. According to the district court, (1) the employee-driver provision was "economically motivated" and an action "that a private company with substantial market power—such as the oligopoly power of the Port—would take when possible," Pet.

App. 125a; (2) the off-street-parking and placard provisions were "designed specifically to generate goodwill among local residents and to minimize exposure to litigation from them," *id.* at 127a; and (3) the maintenance and financial capability provisions were designed "to ensure that the trucking companies had the resources to sustain the Port's investment in cleaner trucks," *ibid.*[3]

D. The Court of Appeals' Decision

In a 2-1 decision, the Ninth Circuit affirmed in part and reversed in part. The court concluded that the employee-driver provision is preempted but that the other four challenged concession provisions are not.

First, the court concluded, as the district court had, that the financial-capability provision does not fall within the terms of the FAAAA's preemption clause. Pet. App. 33a-34a. It further agreed with the district court that the maintenance provision falls within the FAAAA's express safety exception. *Id.* at 35a. That the requirement was also motivated by environmental concerns does not, the Ninth Circuit held, preclude application of the safety exception, "provided that the State's safety motives are not pretextual." *Id.* at 36a. Moreover, the fact that the regulations in part simply duplicate federal law similarly does not preclude application of the exception because "the Port need not demonstrate

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[3] As part of its Clean Truck Plan, the Port had provided financial incentives to purchase compliant new drayage trucks or to retrofit older trucks. Pet. App. 11a. The concession-agreement requirements, however, are not limited to LMCs using trucks purchased through the Port's incentive plan. See *id.* at 44a.

that the requirement to comply with manufacturer's instructions creates safety benefits over and above those [already] created by federal law." *Id.* at 38a.

With respect to the final three challenged requirements (the off-street-parking, employee-driver, and placard provisions), the court's decision turned on its analysis of a "market participant" exception found nowhere in the text of the FAAAA itself. Outlining a "two-prong test adopted by [the Ninth Circuit] as a guide for determining whether the market participant doctrine applies," Pet. App. 21a-22a, the court held that a State's action would qualify for the exception if *either* of two questions could be answered in the affirmative:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?

Id. at 22a (quoting *Cardinal Towing & Auto Repair, Inc.* v. *City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999)).

Acknowledging that the Port's requirements in this case would not satisfy the second prong of the test, as they were "not limited to contracts of a particular size or subsidized by State funds, and are not limited to drayage operations for a particular time," the court instead focused on whether "the nature of the concession agreements is essentially

proprietary." Pet. App. 23a. In doing so, the Ninth Circuit rejected the notion that any market-participant exception under the FAAAA is limited to state actions involving efficient procurement, or to state actions imposing conditions on the specific market in which the state participates, *id.* at 25a-28a. Thus, it held that "when an independent State entity manages access to its facilities, and imposes conditions similar to those that would be imposed by a private landlord in the State's position, the State may claim the market participant doctrine"—and therefore escape preemption under the FAAAA. *Id.* at 29a.

The court ostensibly recognized that, "'[w]here the State seeks to affect private parties' conduct unrelated to the performance of contractual obligations to the State,' the State's actions are 'tantamount to regulation.'" Pet. App. 29a-30a (quoting *Johnson* v. *Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1025-26 (9th Cir. 2010)). The court then proceeded to consider individual provisions of the concession agreements.

For the off-street-parking provision, the court stated that the requirement was imposed based on a belief that it would "mitigate drayage trucks' negative impacts and increase the community goodwill necessary to facilitate Port expansion." Pet. App. 40a. It held that "[e]nhancing good-will in the community surrounding the Port is an important and, indeed, objectively reasonable business interest." *Ibid.*

For the placard provision, the court acknowledged that the challenged provision "may" fall within the section of the FAAAA specifically preempting state or local requirements that a motor carrier "display any form of identification on or in a commercial

motor vehicle . . . other than the forms of identification required by the Secretary of Transportation," 49 U.S.C. § 14506(a). Pet. App. 46a. The court reasoned, however, that "the Port has a proprietary interest in receiving complaints about drayage trucks entering, leaving, and operating on its property" and that the placard requirement falls within the market-participant exception as "[a] private facilities provider would do the same." *Ibid.*[4] The court made little effort to link that statement to statutory text or purpose.

Finally, the court rejected Petitioner's argument that, under *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954), the Port could not enforce even its nonpreempted regulations by denying a federally licensed motor carrier access to the Port. The majority held that, "[w]hile a denial of access to the Port may have more effect on motor carriers than a traditional fine, it does not rise to the level of the comprehensive ban at issue in *Castle*," and that the enforcement authority the Port provided itself under the concession agreements therefore does not violate this Court's precedent. Pet. App. 32a.

Judge N. Randy Smith dissented in part. He concluded that the market-participant exception cannot save from preemption either the off-street-parking provision or the placard provision, and that the enforcement authority claimed by the Port in this case runs afoul of *Castle*. Pet. App. 47a-58a.

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[4] The court concluded that the employee-driver provision could not be upheld under the market-participant doctrine. In imposing that requirement, the court held. the Port had "unilaterally insert[ed] itself into the contractual relationship between motor carriers and drivers." Pet. App. 43a.

On the market-participant exception, Judge Smith applied the same two-prong test as the majority but concluded that "[t]he Port's regulation of drayage services does not qualify as 'efficient procurement' of needed services." Pet. App. 48a. Judge Smith cited with approval the Fifth Circuit's holding that "mere ownership of a facility does not make the government a participant in the markets operating in that facility." *Ibid.* (citing *Smith* v. *Dep't of Agriculture*, 630 F.2d 1081 (5th Cir. 1980)). Relying on dormant Commerce Clause cases from this Court, including the plurality opinion in *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82 (1984), he further reasoned that the Port impermissibly "reaches beyond the immediate parties with whom it transacts, because it does not transact business with drayage service providers." Pet. App. 50a. Because the Port neither purchases nor provides drayage services and indeed "does not involve itself in *any* market activity with the independent contractors and companies providing drayage services," its actions cannot be justified by any market-participant exception to preemption. *Id.* at 51a. Moreover, even if the Port could qualify as a market participant, Judge Smith noted, the off-street-parking requirement is preempted. It is directed not at the "efficient procurement" of services, but rather at "an attempt to address political concerns the Port alleges local community members have raised regarding drayage truck parking practices, which are not related to any contracts between drayage providers and the Port." *Id.* at 56a.

On the Port's ability to bar access to motor carriers to enforce its safety regulations, Judge Smith concluded that "the preemption analysis in

Castle still applies, even if the form of comprehensive federal regulation has changed over the years." Pet. App. 53a-54a. Although the panel majority held that a bar from accessing the Port was distinguishable from the statewide ban at issue in *Castle*, Judge Smith recognized that *Castle* precludes even "partial" suspensions of a motor carrier's federal permit to transport goods if such suspensions "seriously disrupt," without necessarily eliminating, the ability to transport goods. *Id.* at 55a. He further explained that the drayage operations at the heart of this case constitute interstate commerce as "part of the continuous flow of goods between locations *outside* California and customers *within* California." Judge Smith therefore concluded that "[b]arring access to the Port of Los Angeles—the largest port in the United States and one of only a handful of large commercial deep-water ports on the West Coast—would no doubt 'seriously disrupt' drayage carriers' ability to transport goods from ships to other destinations in and outside California." *Id.* at 54a-55a.

SUMMARY OF ARGUMENT

I.A. "When a federal law contains an express preemption clause, we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'" *Chamber of Commerce of U.S.* v. *Whiting*, 131 S. Ct. 1968, 1977 (2011) (quoting *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993)). Here, the FAAAA's plain wording specifically defines the scope of preemption: Any "law, regulation, or other provision having the force and effect of law" that "relate[s] to" the statute's subject matter is preempted. 49 U.S.C. § 14501(c)(1). The Port's

concession agreement constitutes a mandatory requirement, by order of the Board of Harbor Commissioners, imposed on all licensed motor carriers providing drayage services at the Port. Indeed, the concession requirements are incorporated into a tariff that is penally enforceable through fines and even imprisonment. The concession requirements easily have the requisite "force and effect of law"—and fall squarely within the FAAAA's express preemption provision. None of the parties contends otherwise.

B. There is no reason to reach beyond the FAAAA's plain wording by grafting on to the Act a market-participant exception developed by courts in Commerce Clause cases. Congress created several other express exemptions to the FAAAA's broad preemption provisions, but chose not to include a market-participant exception (as it has in other express preemption statutes). Indeed, the Airline Deregulation Act (ADA) provision on which the FAAAA's preemption clause was modeled contains an express exception for "proprietary" acts—the very type of exception respondents ask this Court to create here. 49 U.S.C. § 41713(b)(3). But Congress *omitted* that exception when it drafted the FAAAA. Congress therefore did not intend to include such an exception to the FAAAA's preemption provisions.

Even if the FAAAA does contain an unstated market-participant exception, no such exception can save the Port's actions here. The Port is not a participant in the market for drayage services, because it neither purchases nor provides such services. Nor do the Port's concession requirements serve any conceivable interest in "efficient procurement." Pet. App. 25a. The Port is therefore acting as

a regulator of the drayage market, not as a participant in that market. The falseness of the dichotomy between "regulation" and "market participation," however, is a reason not to go down this path in construing the FAAAA, which uses neither term.

II.A. The decision below conflicts with *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954). In *Castle*, this Court held that a State cannot enforce otherwise-valid trucking regulations through a "partial suspension" of a motor carrier's access to the channels of interstate commerce. But that is precisely the authority claimed by the Port here: the right to suspend or even *revoke* a drayage provider's access to the Port of Los Angeles, the busiest container port in the United States and a crucial channel of interstate commerce. The Port's concession-enforcement provisions cannot be squared with *Castle*—or with this Court's decisions in *City of Chicago* v. *Atchison, Topeka, & Santa Fe Railway*, 357 U.S. 77 (1958) and *Railroad Transfer Service, Inc.* v. *City of Chicago*, 386 U.S. 351 (1967), which reaffirm *Castle*'s core holding.

B. *Castle* remains good law. *Castle*'s holding rested on the fact that, under the Motor Carrier Act, only the federal government can issue—or revoke—interstate transportation permits. Although the Motor Carrier Act has been amended since *Castle*, Congress has not disturbed the overall federal regulatory regime on which this Court relied in *Castle*. To the contrary, Congress has repeatedly reaffirmed that the federal government has exclusive authority to issue and revoke interstate transportation permits. *Castle* therefore remains a vital means of preserving a uniform scheme of federal regulation.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN APPLYING A MARKET-PARTICIPANT EXCEPTION TO CONCLUDE THAT THE OFF-STREET-PARKING AND PLACARD PROVISIONS ARE NOT PREEMPTED BY THE FAAAA

The court of appeals did not disturb the district court's holding that the Port's off-street-parking provision is "related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1). Nor did it dispute that the Port's placard provision requires motor carriers "to display [a] form of identification on or in a commercial motor vehicle . . . other than forms of identification required by the Secretary of Transportation." *Id.* § 14506(a). Yet the Ninth Circuit held that both concession requirements escape federal preemption because they advance vague "proprietary goals" of the Port (Pet. App. 39a)—and therefore fall within an unstated market-participant exception to the FAAAA.

But the FAAAA provisions at issue here say nothing about a market-participant exception. Rather, the statute preempts any "law, regulation, or other provision *having the force and effect of law*" that "relate[s] to" the statute's subject matter. 49 U.S.C. § 14501(c)(1) (emphasis added); see *id.* § 14506(a). As we show below, no one seriously disputes that the off-street-parking and placard provisions have "the force and effect of law." The challenged requirements therefore fall squarely within the text of the FAAAA's express preemption provisions. There is no reason to depart from that

text by reading an unstated market-participant exception into the Act—and every reason not to.

A. The Two Challenged Concession Requirements Fall Within The Statutory Text

The only statutory text at issue is the FAAAA's requirement that, to be preempted under the Act, a state provision must have "the force and effect of law." 49 U.S.C. § 14501(c)(1); *id.* § 14506(a). The challenged concession requirements easily satisfy that statutory standard.

Indeed, in its Brief in Opposition, the Port did not dispute that the requirements have "the force and effect of law." Instead, the Port asserted that it is simply "beside the point" whether the concession agreements have "the force and effect of law" because that "means merely"—*merely*—"that the measure *falls within the language of section 14501(c).*" Opp. 13 (emphasis added). As we discuss below, the Port's dismissive approach to the statutory language in an express-preemption case is remarkable—and cannot be squared with this Court's precedents. But the Port's tacit acknowledgment that the challenged requirements have "the force and effect of law" is scarcely surprising: the requirements are imposed on all licensed motor carriers by order of the Board of Harbor Commissioners and are incorporated into a penally enforceable tariff.

In March 2008, the Board of Harbor Commissioners amended the Port's Tariff No. 4 to require all drayage providers to enter into concession agreements. The Board then issued orders delineating the requirements imposed on drayage providers. As amended, Tariff No. 4 provides that "no Terminal Operator shall permit access into any Terminal in

the Port of Los Angeles to any Drayage Truck unless such Drayage Truck is registered under a Concession from the Port of Los Angeles." JA125. A separate provision of Tariff No. 4—entitled "Penalties for Violation"—declares it "unlawful for any person, firm or corporation to fail, refuse or neglect to comply with any of the provisions of the rules and regulations prescribed by this Tariff." JA85; see also Pet. App. 83a n.5. Any failure to comply with the concession-agreement requirements can therefore give rise to criminal penalties—including a misdemeanor conviction, fines, and imprisonment for up to six months. JA85. The tariff further provides that violators "shall be guilty of a separate offense for each and every day during any portion of which any violation of any provision of this Tariff is committed, continued or permitted by that person." JA86.

The "concession agreement," then, amounts to a comprehensive licensing scheme, enforced by a "penally enforceable" requirement that all terminal operators contract only with motor carriers who obtained the mandatory concession. Pet. App. 83a n.5. As the United States explained at the certiorari stage, "[a]ny common-sense understanding of the term 'force and effect of law' is satisfied by a provision backed by 'criminal penalties which only a state and not a mere proprietor can enforce.'" U.S. Br. 9 (quoting *Wash. State Bldg. & Constr. Trades Council* v. *Spellman*, 684 F.2d 627, 631 (9th Cir. 1982)).

That commonsense conclusion finds additional support in this Court's interpretation of identical language in the preemption clause of the Airline Deregulation Act (ADA). In *American Airlines* v.

Wolens, 513 U.S. 219, 226 (1995), members of an airline's frequent-flyer program alleged that the airline breached its contracts with passengers and that it violated the State's Consumer Fraud Act. The Court held that the fraud claims were clearly preempted because the state statute was "prescriptive; it control[led] the primary conduct of those falling within its governance" and served as "a means to guide and police" the practices of the airlines. *Id.* at 227, 228.

The Court went on to rule that the contract claims were not preempted under the ADA. State-court enforcement of "privately ordered obligations," the Court held, does not constitute the enforcement of "'any law, rule, regulation, standard, or other provision having the force and effect of law' within the meaning of" the Act. 513 U.S. at 228-229 (quoting Br. for United States as *Amicus Curiae* 9).[5] *Wolens* therefore stands for the proposition that the ADA's preemption clause "stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated." *Id.* at 232-233; see *id.* at 229 n.5 ("States may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier.").

The challenged action here is not state-court enforcement of any privately ordered obligations

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[5] The Court noted that "the phrase 'having the force and effect of law' is most naturally read to 'refer to binding standards of conduct that operate irrespective of any private agreement.'" 513 U.S. at 229 n.5 (brackets omitted) (quoting Br. for United States as *Amicus Curiae* 16).

between, for example, motor carriers and terminal operators. Rather, the challenged action is the Port's imposition of "substantive standards" and "theories of competition" on the operations of drayage providers. Indeed, the placard provision requires motor carriers to adopt a Port-specified identification tag—in the face of express statutory language barring precisely that. See 49 U.S.C. § 14506(a) (no State or subdivision may require a motor carrier to "display any form of identification on or in a commercial motor vehicle"). The off-street-parking provision likewise represents a *direct* regulation of motor carriers, contrary to the FAAAA's broad preemption language. See 49 U.S.C. § 14501(c)(1).

Small wonder, then, that the first Ninth Circuit panel acknowledged that the concession requirements represent "an extensive attempt to reshape and control the economics of the drayage industry in one of the largest ports in the nation," and to advance an array of "purely environmental" policy goals. Pet. App. 225a-226a; see JA93 (Port sought to "transform the drayage marketplace"). The imposition of such "substantive standards"—however classified, but especially through a penally enforceable municipal ordinance—constitutes the "enact[ment of] . . . a law, regulation, or other provision having the force and effect of law," 49 U.S.C. § 14501(c)(1), and is preempted on that basis.

B. There Is No Reason To Depart From The Statutory Text In This Case

1. "[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted). "When a federal law

contains an express preemption clause," this Court "'focus[es] on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'" *Chamber of Commerce of U.S.* v. *Whiting*, 131 S. Ct. 1968, 1977 (2011) (quoting *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993)).

Here, "the plain wording" of the FAAAA's preemption clause expressly defines the scope of preemption to encompass any "law, regulation, or other provision having the force and effect of law." 49 U.S.C. § 14501(c)(1); see *id.* § 14506(a). It is therefore irrelevant in this case whether the concession requirements have "proprietary" aspects, "regulatory" aspects, or both: The dispositive question, according to Congress, is whether the challenged requirements constitute a "law, regulation, or other provision, having the force and effect of law" and related to the statutory subject matter. That may be a difficult question in some cases, but not here: As shown above, the penally enforceable concession requirements have "the force and effect of law" under any commonsense definition of the phrase. That should be the end of the matter.

According to the Port, however, "[w]hether the market participant doctrine is applicable is a *separate question*" from the question whether state action "falls within the language of section 14501(c)." Opp. 13 (emphasis added). In other words, the Port concedes that the market-participant exception it invokes is untethered to the "force and effect of law" standard—or to any other statutory language. The court of appeals likewise did not seriously address whether the challenged requirements carry the "force and effect of law." Applying a variant of the

market-participant exception developed by courts primarily in Commerce Clause cases, the panel majority asked *only* whether the concession requirements were "proprietary" in nature. See Pet. App. 39a ("The real issue is whether the off-street parking provision was adopted to further specific proprietary goals."); *id.* at 46a ("The placard provision is proprietary in nature.").

"[T]he 'market participant' doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted." *Wis. Dep't of Indus., Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282, 289 (1986). Because Congress *has* acted here, the proper inquiry is therefore not "[w]hat the Commerce Clause would permit States to do in the absence of the [FAAAA]," but rather "what States may do with the Act in place." *Id.* at 290. Here, the "Act in place" expressly bars States from taking any action having "the force and effect of law." Nothing in the text of the Act even hints that Congress intended to include an unstated market-participant exception as an additional limit to the clause's expansive reach.

The FAAAA provides several statutory exceptions to its broad preemption scheme—but no market-participant exception. Indeed, the same statutory subsection of the FAAAA broadly preempting regulation of motor carriers specifically provides that the clause "shall not restrict the safety regulatory authority of a State" or the state's authority to impose highway route controls and financial-responsibility regulations relating to insurance requirements. 49 U.S.C. § 14501(c)(2)(A). Separate provisions similarly indicate that the statute's pre-

emptive scope does not extend to "intrastate transportation of household goods," *id.* § 14501(c)(2)(B), or to a State's or municipality's authority to regulate "the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner" of the motor vehicle, *id.* § 14501(c)(2)(C).

The presence of those carefully crafted statutory exceptions forecloses any inference that the FAAAA also contains another, unstated, exception. In *Rowe*, the State defended a law regulating the delivery of tobacco by focusing on the "*reason why* it ha[d] enacted" the challenged law. *Rowe*, 552 U.S. at 374. The State contended that the law was not preempted under the FAAAA because the Act "does not preempt a State's efforts to protect its citizens' public health." *Ibid.* This Court rejected the argument that the Act contains any such unstated exemption: The FAAAA "explicitly lists a set of exceptions (governing motor vehicle safety, certain local route controls, and the like), but the list says nothing about public health." *Ibid.* So too here: The FAAAA "explicitly lists a set of exceptions . . . but the list says nothing about" the market-participant exception applied by the court of appeals.

That silence is all the more striking in this case because the preemption clause of the ADA—on which Congress expressly modeled the FAAAA's clause (*Rowe*, 552 U.S. at 370)—includes a statutorily defined form of the very exception that respondents seek to read into the FAAAA. The ADA provides that the Act's preemption clause does not prevent a state- or municipality-owned or -operated airport "from carrying out its proprietary powers and rights." 49 U.S.C. § 41713(b)(3). Given the degree to

which Congress looked to the ADA's preemption language in crafting the identical language in the FAAAA, the omission of any market-participant exception from the FAAAA shows that Congress did not intend to include any such exception to the FAAAA's preemption clause. See *Custis* v. *United States*, 511 U.S. 485, 492 (1994).

Congress was aware of *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992), in drafting the FAAAA's preemption clause. See *Rowe*, 552 U.S. at 370. In *Morales*, this Court rejected a narrow reading of the ADA's preemptive scope proposed by a party, stating that, "if the pre-emption effected by § 1305(a)(1) were such a limited one, no purpose would be served by the very next subsection, which preserves to the States certain proprietary rights over airports." 504 U.S. at 385-386. In omitting even the ADA's limited "proprietary rights" exception from the FAAAA's preemption subsection, Congress could not have intended to enact *sub silentio* an even broader—yet unexpressed—market-participant exception.

When Congress *intends* to create a market-participant exception, it knows how to do so expressly. See, *e.g.*, 15 U.S.C. § 2075(b) (preemption provision "does not prevent . . . a State from establishing or continuing in effect a safety requirement applicable to a consumer product for its own use"); *id.* § 1203(b) (preemption provision does not prohibit a State from establishing "a flammability standard or other regulation applicable to a fabric, related material, or product for its own use"); *id.* § 1476(b) (preemption provision does not prevent a State from establishing packaging standards "with respect to a household substance for its own use"); 49 U.S.C.

§ 30103(b)(1) (preemption provision does not prevent a State from "prescrib[ing] a standard for a motor vehicle or motor vehicle equipment obtained for its own use"); *id.* § 32919(c) (preemption provision does not prevent a State from establishing "requirements for fuel economy for automobiles obtained for its own use"); *id.* § 32304(i)(2) (preemption provision regarding motor vehicle country-of-origin labeling does not prevent a State from prescribing requirements "related to the content of passenger motor vehicles obtained for its own use"). Congress would have had no reason to create express market-participant exceptions to other preemption statutes if it intended courts simply to read such an exception into the statutes. See *City of Charleston* v. *A Fisherman's Best, Inc.*, 310 F.3d 155, 178-179 (4th Cir. 2002) ("[w]e find no explicit provision creating a proprietary exception" to the Magnuson Act).

Relying on *Building & Construction Trades Council* v. *Associated Builders & Contractors* ("*Boston Harbor*"), 507 U.S. 218 (1993), the Port nevertheless argues that "the market participant doctrine creates exceptions to preemption where there is *no* statutory language providing for such an exception." Opp. 12 (emphasis added). *Boston Harbor* supports no such sweeping proposition.

Boston Harbor dealt with *implied* preemption under the National Labor Relations Act (NLRA). By definition, then, there was no preemptive language to construe. This case, in contrast, concerns the interpretation of an *express* preemption clause. And that clause defines the scope of preemption broadly to encompass any State action with "the force and effect of law." That statutory language—and not a distinct body of dormant Commerce Clause case

law—is surely the "'best evidence of Congress' preemptive intent.'" *Whiting*, 131 S. Ct. at 1977 (quoting *CSX Transp.*, 507 U.S. at 664).

Nor does *Boston Harbor* even remotely suggest—as respondents do—that a market-participant exception applies in every preemption case *irrespective* of the statute involved. To the contrary, the Court in *Boston Harbor* looked to specific "NLRA pre-emption principles," 507 U.S. at 224, and determined that Congress did not intend *that statute* to preempt "enforcement by a state authority, acting as the owner of a construction project, of an otherwise lawful prehire collective-bargaining agreement." *Id.* at 220.[6] In other words, *Boston Harbor* reinforces the fundamental principle stated just one Term earlier: When courts interpret a preemption provision, "[t]he question, at bottom, is one of statutory intent, and we accordingly begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Morales*, 504 U.S. at 383 (internal quotation marks omitted); see *Boston Harbor*, 507 U.S. at 231-232.

2. Even if the FAAAA includes an unstated market-participant exception, no such exception could save the regulatory actions taken by the Port here.

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[6] Congress amended the NLRA to authorize employers in the construction industry—but not other employers—to enter into such agreements. The Court explained that there was "no reason to expect the[] defining features of the construction industry [promoting enactment of the prehire provision] to depend upon the public or private nature of the entity purchasing contracting services." *Boston Harbor*, 507 U.S. at 231.

The court of appeals purported to adopt the first "prong" of the market-participant test applied by some lower courts. That prong asks whether the "challenged action essentially reflect[s] the entity's own interest in its efficient procurement of needed goods and services," Pet. App. 22a (quoting *Cardinal Towing & Auto Repair, Inc.* v. *City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999)). The court of appeals acknowledged that, in this case, the challenged requirements do *not* further any conceivable interest by the Port in efficient procurement. Yet the panel majority set aside that fact on the ground that the "efficient procurement" requirement does not actually require any interest in "efficient procurement" at all: The "efficient procurement" test, the panel explained, "is useful in cases where the government is buying goods or seeking services, but it is not the be-all-and-end-all of proprietary action." *Id.* at 25a. The court therefore applied a vague "proprietary action" standard that asked only whether the Port did something here that a private landlord could *conceivably* do.

But every time this Court has recognized a market-participant defense in a preemption context, it has limited the exception to state actions aimed at the efficient procurement of goods and services or at the use of state-allocated funds. In *Chamber of Commerce of U.S.* v. *Brown*, 554 U.S. 60 (2008), this Court held that a state statute was preempted by the NLRA, and not within a market-participant exception, because it was "neither 'specifically tailored to one particular job' nor a 'legitimate response to state procurement constraints.'" *Id.* at 70 (quoting *Gould*, 475 U.S. at 291). The purpose of the statute was "not the efficient procurement of goods and services, but the furtherance of a labor policy." *Ibid.* *Brown*

stands in contrast to *Boston Harbor*, in which the challenged action "was specifically tailored to one particular job"—a construction project—and the state authority "was attempting to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." 507 U.S. at 232.

Brown and *Boston Harbor* reject the argument—embraced by the Ninth Circuit here—that a State acts as a market participant whenever it does something that a private party could do. Private actors, like state actors, sometimes act to further a "policy concern rather than a profit motive." *Boston Harbor*, 507 U.S. at 229. But when a *State* acts to advance specific policy goals, "it performs a role that is characteristically a governmental rather than a private role." *Ibid.* That increases the "'inherent potential for conflict' between the state and federal schemes"—the core concern in preemption cases. *Brown*, 554 U.S. at 70 (quoting *Gould*, 475 U.S. at 289). This Court's limitation of the market-participant doctrine in preemption cases to a narrow range of state actions directly related to the "efficient procurement of goods and services" avoids the potential for conflict by ensuring that a State is truly acting "as a market participant with no interest in setting policy." *Ibid.*

Unbounded by any "efficient procurement" constraint in this case, the panel majority applied a sweeping market-participant exception that exempts from preemption restrictions on motor carriers so long as they were imposed to "[e]nhanc[e] good-will in the community surrounding the Port." Pet. App. 40a. Even if it is true that a private entity put in the shoes of the Port would take actions "to placate

community concerns," *id.* at 41a, allowing a municipal governmental body to justify its actions as a "market participant" using that open-ended rationale creates an exception that swallows the FAAAA's deregulatory scheme. As the United States explained in the certiorari stage, "a government entity could convincingly claim such an interest for even the most thinly veiled regulatory action." U.S. Br. 11. That is precisely what the Port has done here.

As noted, the concession agreement represents nothing less than "an extensive attempt to reshape and control the economics of the drayage industry in one of the largest ports in the nation" and to promote specific environmental policies. Pet. App. 225a-226a. The challenged actions are therefore "'tantamount to regulation' or policymaking," *Boston Harbor*, 507 U.S. at 229—and outside the scope of the narrow market-participant exception this Court has applied in implied-preemption cases.

The court of appeals' market-participant analysis suffers from yet another fundamental defect: The Port is *not* a participant in the drayage market. As the panel majority recognized, the Port neither provides nor procures drayage services. Pet. App. 28a ("[T]he Port does not purchase drayage services."). By imposing requirements governing drayage services, the Port is therefore acting as a *regulator* of—not a proprietor in—the drayage market. This Court has recognized even in Commerce Clause cases that the market-participant exception requires "*direct* state participation in the market." *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 435 n.7 (1980) (internal quotation marks omitted) (emphasis added).

Nor can the Port defend its regulation of the drayage market on the ground that it interacts with terminal operators who, in turn, contract with drayage providers. A plurality of this Court rejected such an attempt to regulate downstream markets in *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82 (1984). In that case, the State of Alaska proposed to condition the sale of timber from state-owned lands on a contractual requirement whereby the purchaser agreed that the timber be processed in the State before it was exported. See *id.* at 84-85. The plurality rejected the State's argument that it was merely acting as a market participant: "The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further." *Id.* at 97. In reaching that conclusion, the plurality emphasized that "downstream restrictions have a greater regulatory effect than do limitations on the immediate transaction. Instead of merely choosing its own trading partners, the State is attempting to govern the private, separate economic relationships of its trading partners." *Id.* at 99. The same principle forecloses the Port's sweeping version of the market-participant argument here.

Indeed, in *Florida Transportation Services, Inc.* v. *Miami-Dade County*, 703 F.3d 1230, 2012 WL 6719581 (11th Cir. 2012), the Eleventh Circuit held (in a Commerce Clause challenge) that the market-participant exception does not apply in a situation analogous to that presented here. In *Miami-Dade*, the Port of Miami sought to impose conditions on the purchase of stevedore services at the port even though the port was not itself a provider or

purchaser of such services.[7] The Eleventh Circuit held that the port was not acting as a market participant because "the County does not provide stevedore services." 2012 WL 6719581, at *29; see *Smith* v. *Dep't of Agriculture*, 630 F.2d 1081 (5th Cir. 1980) (state owner of a farmers' market was not acting as a participant within that market because it did not engage in the purchase or sale of goods sold there).

As the United States noted in its brief at the certiorari stage, the Port of Los Angeles functions essentially as publicly managed transportation infrastructure, not simply a commercial operation. U.S. Br. 9. Indeed, ports generally, and the Port of Los Angeles specifically, often exercise a near-monopoly power on the channels of interstate and international trade they control. See Pet. App. 125a. Ratifying the Port's market-participant defense would create exactly the patchwork the FAAAA is meant to avoid, with each port in the nation free to use its market power to impose its own particular set of goodwill-enhancing requirements on motor carriers.[8] See *Rowe*, 552 U.S. at 373 ("[T]o interpret the federal law to permit these, and similar, state requirements could easily lead to a patchwork of state service-determining laws, rules, and

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[7] Stevedores manage the loading and unloading of ships. Pet. App. 6a n.5.

[8] Indeed, a proposed bill in Washington—entitled "Regulating drayage truck operators"—would exacerbate the patchwork of state regulations by purporting to insert ports directly into the drayage market as providers of drayage services and employers of drayage operators. H.B. 2395, 62d Leg., Reg. Sess. (Wash. 2012). The Court should not countenance such transparent efforts to regulate interstate commerce.

regulations. That state regulatory patchwork is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace.").

So the Ninth Circuit's decision is wrong—blatantly so—on its own terms. But the manipulability of the distinction between "proprietary" and "regulatory" use of a municipality's powers shows the wisdom of following statutory language and purpose (which here include neither those words nor that distinction) rather than doctrine from other areas perceived to be analogous. The looseness of the Ninth Circuit's analysis was not a necessary evil. This Court need not and should not follow the Ninth Circuit down that path.

II. *CASTLE* BARS THE PORT FROM ENFORCING EVEN OTHERWISE-NONPREEMPTED REGULATIONS ON MOTOR CARRIERS BY SUSPENDING OR REVOKING THEIR ACCESS TO THE PORT

In *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954), this Court recognized important limits on a State's authority to enforce specifically targeted laws against federally licensed motor carriers. Those restrictions on a State's ability to disrupt the interstate operations of licensed motor carriers, even in the enforcement of an otherwise permissible regulation, remain vital to the deregulatory scheme Congress has now instituted over the trucking industry. The panel majority's decision below disregards those limits and allows the Port to claim precisely the authority that *Castle* bars it from asserting.

A. The Decision Below Conflicts with *Castle*

In *Castle*, Justice Black wrote the opinion for a unanimous Court. A motor carrier challenged an Illinois statute governing weight limits on freight transported by commercial trucks through the state. The statute provided that repeated violations of the weight limits were punishable by the suspension of the carrier's right to use Illinois highways for a period of 90 days or one year, depending on the number of infractions. 348 U.S. at 62.

Assessing the State's authority to impose such a punishment, this Court noted that, through the Motor Carrier Act of 1935, Congress "adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce . . . [that] was so all-embracing that former power of states over interstate motor carriers was greatly reduced." 348 U.S. at 63. Under the Motor Carrier Act's regulatory scheme, the Interstate Commerce Commission (ICC) was given the *exclusive* power to determine which motor carriers could operate in interstate commerce. *Ibid.* In addition, a separate provision of the same Act "placed within very narrow limits the Commission's power to suspend or revoke an outstanding certificate," *ibid.*, with the Act providing that "[n]o certificate is to be revoked, suspended or changed until after a hearing and a finding that a carrier has willfully failed to comply with the provisions of the Motor Carrier Act or with regulations properly promulgated under it," *id.* at 63-64.

In light of a regulatory scheme that (1) allocated to a federal agency the power to grant certificates of interstate operating authority to motor carriers and (2) placed specific limits on the agency's ability to re-

voke or suspend that certificate, the Court reasoned that "it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate." 348 U.S. at 64. And the Court explained that it "cannot be doubted that suspension of this common carrier's right to use Illinois highways is the equivalent of a partial suspension of its federally granted certificate." *Ibid.* The Court noted that, "if the ninety-day or the one-year suspension should become effective, the carriage of interstate goods into Illinois and other states would be seriously disrupted." *Ibid.* Thus, the State could set weight limits on trucks, but the Court held that the State could enforce those limits only through "conventional forms of punishment"—not through suspension of a carrier's federally granted right to use state highways for interstate commerce. *Id.* at 64, 65.

Subsequent cases have reaffirmed that the scheme of federal regulation of motor carriers precludes States from exercising a "veto power" over motor carriers—even to enforce otherwise-permissible regulations. Four years after *Castle*, in *City of Chicago* v. *Atchison, Topeka, & Santa Fe Railway*, 357 U.S. 77 (1958), Justice Black again wrote for the Court (but this time over a dissent by Justice Harlan arguing that the Court was acting prematurely). Rejecting arguments made by the City of Chicago, Justice Black's majority opinion stated: "[I]t would be inconsistent with [the Interstate Commerce Act's] policy if local authorities retained the power to decide whether the railroads or their agents could engage in the interterminal transfer of interstate passengers." *Id.* at 87.

Nine years later, Justice Black again wrote for the Court and again rejected arguments—including prematurity—advanced by the City of Chicago. In *Railroad Transfer Service, Inc.* v. *City of Chicago*, 386 U.S. 351 (1967), the Court wrote: "Here the city seeks to enforce each and all of these related [licensing] requirements by denial of a license for noncompliance and then criminal sanctions for operation without a license. This is the 'veto power' which *Atchison* held the city may not exercise." *Id.* at 360. Justice Harlan dissented on the basis of the opinion below, which had held the preemption challenge to be premature. *Ibid.* (dissenting statement); *id.* at 356-357 (describing holdings below).

The concession agreements in this case arrogate to the Port exactly the "veto power" that state and municipal authorities are barred from exercising under *Castle* and its progeny: the power to suspend access to the channels of interstate commerce. Schedule 4 of the Port's mandatory concession agreement provides that "[a]ny failure to comply with the terms and conditions of this Concession" constitutes a "default under this Concession" by the motor carrier. JA74. In the event of a default not timely cured, the schedule provides that the Port has the authority to "deny *any and all access* to Port property by the Concessionaire." JA73 (emphasis added). The schedule goes on to provide that, in the event of a "Major Default," the Port may issue either "[a]n order *suspending* for a period not to exceed thirty (30) days the right of the Concessionaire to provide Drayage Services at the Port" or "[a]n order of *revocation* of this Concession Agreement and of the right of the Concessionaire to provide Drayage Services at the Port." JA82 (emphasis added).

The panel majority nevertheless attempted to distinguish *Castle* on the ground that, "[u]nlike a ban on using all of a State's freeways, a limitation on access to a single Port does not prohibit motor carriers from participating in 'transport [of] interstate goods to and from that State' or eliminate 'connecting links to points in other states.'" Pet. App. 32a (quoting *Castle*, 348 U.S. at 64). The majority conceded that "a denial of access to the Port may have more effect on motor carriers than a traditional fine," but it concluded that such a denial "does not rise to the level of the comprehensive ban at issue in *Castle*." *Ibid.*

But *Castle* does not apply only to "comprehensive ban[s]" on the operations of licensed motor carriers. Rather, *Castle* forbids even any "*partial* suspension of [a motor carrier's] federally granted certificate." 348 U.S. at 64 (emphasis added). The Port's authority to impose a "suspension" or complete "revocation" of a carrier's access to the Port is such a "partial suspension." It falls within *Castle*'s exact terms. The United States so recognized at the certiorari stage. U.S. Br. 22 n.8.

Indeed, as the district court recognized in its factual findings in this case, by 2007 cargo volume, the Port of Los Angeles "ranked as the busiest container port in the United States, the thirteenth busiest in the world, and the fifth busiest in the world when combined with the cargo volume of the adjacent the Port of Long Beach." Pet. App. 69a. In 2007, the total value of cargo handled by the port amounted to more than $240 billion, including $115 billion in trade with China alone. Being denied access to the stream of foreign and interstate commerce passing through the Port would "seriously

disrupt[]" a motor carrier's operations. *Castle*, 348 U.S. at 64; Pet. App. 54a (Smith, J., dissenting in part) (drayage operations at the Port "are part of the continuous flow of goods between locations *outside* California and customers *within* California").

Ignoring both *City of Chicago* decisions (although they had been cited in the certiorari petition), the United States suggested at the certiorari stage that a challenge to the enforcement provisions of the Port's concession plan can be brought only in an as-applied challenge once a punishment had been levied. U.S. Br. 22. That argument has been made by none of the parties, and an argument made only by an *amicus* should not be considered. In any event, the United States is palpably wrong. It is sufficient for invalidation under *Castle* and the *City of Chicago* cases that the Port claims the *authority* to suspend or revoke a motor carrier's access to the Port. Applying such a punishment to the licensed motor carrier as a business enterprise, rather than simply taking out of service a truck that does not meet a state or local safety regulation, goes well beyond the "conventional forms of punishment" permitted by *Castle*. *Castle*, 348 U.S. at 64. The fact that the Port here "'claims at least some power . . . to decide whether a motor carrier may'" operate at the Port renders the enforcement provisions of its concession agreement scheme invalid. *Railroad Transfer Serv.*, 386 U.S. at 357 (quoting *Atchison, Topeka & Santa Fe Ry.*, 357 U.S. at 85).

Castle and the *City of Chicago* cases are controlling. Therefore, even those regulations that were held below to be unpreempted (either because they fall within the safety exception or because, despite being specifically targeted at motor carriers, they are not related to a price, route, or service) cannot be

enforced through a suspension of a motor carrier's right to operate in interstate commerce.

B. *Castle* Remains Good Law

In light of its strained conclusion that the Port's enforcement provisions do not conflict with *Castle*, the panel majority declined to decide whether Castle's holding was "modified" by the FAAAA (or any other statute). Pet. App. 32a. But nothing that Congress has done since *Castle* has affected the existing limits on a State's or municipality's authority to enforce safety regulations through a suspension of a carrier's right to operate in interstate commerce. Pet. App. 54a (Smith, J., dissenting in part). To the contrary, Congress has, since *Castle*, repeatedly *reaffirmed* the federal government's exclusive authority to issue interstate-commerce permits—and to revoke such permits. *Castle* therefore remains a valid means of preserving a uniform scheme of federal regulation.

When Congress deregulated the trucking industry at the federal level through the Motor Carrier Act of 1980, it preserved the key features of the system on which this Court relied for its holding in *Castle*, indicating its intent to continue to incorporate the Court's holding within the broader statutory scheme. Cf. *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85-86 (2006) ("[W]hen 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'" (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998))).

Thus, under the regulatory scheme as modified by the 1980 Act, the ICC continued to grant certificates of operating authority, with the new legislation simply modifying the showing a motor carrier must make to receive such a certificate. See Pub. L. No. 96-296, § 5(a)(3), 94 Stat 793, 794 (1980) (setting out conditions under which the ICC "shall issue" an operating certificate to a motor carrier). Just as importantly, the law did not materially affect the ICC's ability to suspend or revoke an operating certificate.[9]

Almost simultaneously with the passage of the FAAAA, Congress enacted the Trucking Industry Regulatory Reform Act (TIRRA) of 1994, Pub. L. No. 103-311, 108 Stat. 1673. That Act again modified the showing needed to obtain a certificate of now nationwide interstate operating authority, but it too preserved the underlying structure of ICC approval of interstate motor carriers. Pub. L. No. 103-311, § 207, 108 Stat. 1673, 1686.

The ICC Termination Act (ICCTA) of 1995, Pub. L. No. 104-88, 109 Stat. 803, followed one year after the enactment of TIRRA. Although the ICCTA provides for "register[ing]" motor carriers, rather than issuing certificates to such carriers (and has reassigned this task from the now-defunct ICC to the

---

[9] Safety concerns were addressed in the legislation not by providing States *additional* regulatory authority, but rather by including new minimal-insurance provisions within the Act. See H.R. Rep. No. 96-1069, at 6 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2283, 2288 (safety concerns stemming from provisions for expanded entry of new carriers into trucking market are addressed through "inclusion of minimum insurance coverage for operators as part of the fit, willing and able requirement").

Secretary of Transportation), the statute still conditions registration on a showing that the carrier is willing and able to comply with applicable safety and minimum financial responsibility requirements. See Pub. L. No. 104-88, § 13902, 109 Stat. 803, 880; 49 U.S.C. § 13902(a)(1); see also *id.* § 31144(a)(1) (providing that the Secretary of Transportation shall "determine whether an owner or operator is fit to operate safely commercial motor vehicles, utilizing among other things the accident record of an owner or operator operating in interstate commerce"). And, once again, the ICCTA specifies exactly when and how the Secretary can suspend or revoke a carrier's interstate transportation registration. See ICCTA, Pub. L. 104–88, § 13905(c)-(e), 109 Stat. 803, 884-885; 49 U.S.C. § 13905(e)-(f).[10]

Congress has therefore consistently reaffirmed the overall regulatory structure—in which the federal government has exclusive authority to issue and revoke interstate transportation permits—on

---

[10] In 2005, 49 U.S.C. § 31144 was amended to allow certain States to determine whether a motor vehicle operator is unfit to operate in interstate commerce under federal standards. Safe, Accountable, Flexible Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 4114(c), 119 Stat. 1144 (2005). The statute as amended still provides that only the Secretary of Transportation can prohibit such operators from operating in interstate commerce, and sets out specific circumstances in which an operator can be deemed unfit. Moreover, while "State" is defined in other sections of the same title to include "a political subdivision of a State," it is *not* so defined for the statutory section governing an "unfitness" determination. See 49 U.S.C. § 31132(8). To the extent the 2005 amendment affects the ability of a state or local authority to bar a federally licensed motor carrier from participating in interstate commerce at all, then, it does so only by channeling state participation in a specific, statutorily prescribed fashion.

which this Court based its decision in *Castle*. And nothing in the FAAAA, enacted in 1994, alters that regime. Although the FAAAA excepts state safety regulations from the otherwise broad scope of the Act's preemption clause, that exception does not create any *new* regulatory enforcement authority for the States. Rather, it provides simply that the Act's preemption clause "shall not *restrict* the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A) (emphasis added); see also *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 439 (2002).

The legislative history of the FAAAA confirms that Congress did not intend to *expand* States' authority to regulate interstate motor vehicles, even to enforce safety requirements. "[N]othing in these new subsections [preserving States' authority over safety regulations] contains a new grant of Federal authority to a State to regulate commerce and *nothing in these sections amends other Federal statutes that govern the ability of States to impose safety requirements*." H.R. Conf. Rep. No. 103-677, at 83 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755 (emphasis added).

Federal regulation of the interstate trucking industry has undoubtedly undergone significant changes between 1954 and the present. Through each amendment to the statutory scheme governing the trucking industry, however, Congress has preserved the overall regulatory structure that this Court relied on in *Castle*. A federal agency remains in charge of both the issuing and the suspension or revocation—through specifically outlined procedures—of a motor carrier's authority to transport goods in interstate commerce. Similarly, although

Congress exempted state safety regulations from the scope of FAAAA preemption, in doing so it did not provide any indication that it intended to expand the regulatory authority of the States so as to overturn this Court's holding in *Castle*.

Kurns v. *Railroad Friction Products Corp.*, 132 S. Ct. 1261, 1267 (2012), illustrates the correct analysis of an argument that a holding of this Court regarding preemption has been superseded by statutory changes. *Kurns* addressed whether state-law tort claims regarding defective locomotive parts were preempted by the Locomotive Inspection Act (LIA). As amended in 1915, the LIA provided specific safety regulations governing locomotive parts, and authorized the ICC to carry out the Act's requirements. In 1926, in *Napier* v. *Atlantic Coast Line Railroad*, 272 U.S. 605 (1926), this Court held that state laws regulating locomotive parts were preempted by the LIA, which, the Court held, granted the ICC broad authority over the field of locomotive-equipment standards.

Seeking to avoid preemption of their state-tort claims, the petitioners in *Kurns* contended that *Napier* was no longer good law on the ground that the Federal Railroad Safety Act of 1970 (FRSA) altered the LIA's preemptive scope. The Court unanimously rejected that argument. Relying on language in the FRSA authorizing the Secretary of Transportation to prescribe regulations "supplementing laws and regulations in effect on October 16, 1970," the Court concluded that the FRSA "does not alter pre-existing federal statutes on railroad safety." *Kurns*, 132 S. Ct. at 1263, 1267. Rather, the Court explained, "it leaves existing statutes intact." *Id.* at 1267 (internal quotation marks omitted). The Court

therefore held that the preemption principles articulated in *Napier* were not altered by the subsequent legislation.

Here, as in *Kurns*, the statutory basis for this Court's decision in *Castle* remains intact. Indeed, Congress has expressly *preserved* the federal government's exclusive authority to issue and revoke interstate transportation permits. This Court has long recognized the "special force of the doctrine of *stare decisis* with regard to questions of statutory interpretation." *Kurns*, 132 S. Ct. at 1267 (quoting *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060, 2068 (2011)); see also, *e.g.*, *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008); *Neal* v. *United States*, 516 U.S. 284, 296 (1996) ("Congress, not this Court, has the responsibility for revising its statutes. Were we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair."). In the absence of any indication that Congress intended to alter the limits on a State's authority to suspend federally licensed carriers from engaging in interstate commerce, *Castle* remains good law. This Court should apply *Castle* and enjoin enforcement of the Port's concession remedies.[11]

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[11] Respondents' suggestion that *Castle*'s holding has been "qualified" by subsequent decisions of this Court is without merit. Opp. 37 (quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963)). The principle that *Florida Lime* said was "qualified" was not the holding of *Castle*, but rather an argument from the petitioner that compliance with federal standards regarding avocado marketing immunized growers from more demanding state regulations. Indeed, *Florida Lime* reinforces that a State cannot "exclude" a federally licensed entity from interstate commerce. See 373

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted.

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U.S. at 142. In any event, in the *City of Chicago* cases this Court (before and after *Florida Lime*) reaffirmed the basic principle adopted in *Castle*. See *R.R. Transfer Serv.*, 386 U.S. at 359; *Atchison*, 357 U.S. at 85.

RESPONDENT'S BRIEF

No. 11-798

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In The Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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RESTATEMENT OF QUESTIONS PRESENTED

49 U.S.C. § 14501, a trucking deregulation provision of the Federal Aviation Administration Authorization Act of 1994, provides in relevant part as follows:

> (c) Motor carriers of property. –
>
> (1) General rule. – Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . .
>
> (2) Matters not covered. – Paragraph (1) –
>
> (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles . . . .

The questions presented are:

1. Whether certain aspects of a motor carrier-related contract utilized by the Port of Los Angeles – a commercial enterprise located on governmentally owned land and operated by a municipal entity – designed to permit the Port to expand its business and to achieve other commercial objectives, fall within the market-participant exception to preemption and hence are not preempted by 49 U.S.C. § 14501.

RESTATEMENT OF QUESTIONS PRESENTED – Continued

2. Whether *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954), provides a separate and independent basis, apart from 49 U.S.C. § 14501, for precluding a contractual requirement by the Port that motor carriers seeking access to the city-owned property on which the Port is located agree to take certain safety-related measures.

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STATEMENT OF THE CASE

I. FACTS AND HISTORY OF THE CASE

Most of the introductory Statement ("Statement") in the brief of petitioner American Trucking Associations, Inc. ("ATA"), Pet. Br. 1-16, is factually accurate. However, that Statement includes conclusory attributions of purpose to the Port of Los Angeles ("POLA" or "the Port") as well as unsupported and incorrect factual and legal conclusions. Accordingly, we set out here our own Statement of the Case. We will not repeat unnecessarily points made in ATA's Statement, but we will correct inaccuracies in that Statement and will describe certain key points that are either omitted by ATA or that, while mentioned in passing, require emphasis because of their importance to the required legal analysis.

At the outset, it is critical that POLA, although controlled by the City of Los Angeles Harbor Department, is a *commercial* enterprise. POLA is the largest port in the United States by container volume. Pet. App. 6a, 69a. It competes with other ports in the country, as well as with ports in Mexico and Canada, for cargo and ship traffic. *Id.* at 6a, 73a. The Port is located on sovereign, city-owned land and operates for the most part as a landlord port.[1] *Id.* at 5a-6a, 71a.

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[1] POLA is operated and the land on which it is located is owned by the city as trustee, for the benefit of the people of California, for purposes including "maritime commerce" and "navigation." *See Patton v. City of Los Angeles*, 169 Cal. 521, 524 (Cal. 1915); City of Los Angeles Charter, art. VI, §§ 601,

(Continued on following page)

This means that it secures its revenues principally from rent paid by Marine Terminal Operators ("MTOs") – private companies that do the necessary stevedoring work of loading and unloading cargo at wharves within the property covered by their leases and that control access to that property (which is not open to the general public) at their terminal gates. *See id.* at 71a-72a; JA105. POLA neither collects nor receives any of the City of Los Angeles' general fund taxes, nor does it expend any taxpayer money. Pet. App. 5a, 70a. The Port also receives revenue for the provision of port services such as pilotage services (piloting ships within the Port's channels to and from the wharves), as well as from wharfage fees (based on cargo amounts), dockage fees (based on each ship's dockage at the Port), and passenger fees (for commercial passenger vessels). *See id.* at 70a; Court of Appeals Excerpts of Record, vol. 4 of 5 ("4 C.A. E.R.") at 718-19, No. 10-56465 (9th Cir. Dec. 29, 2010), ECF No. 16.

POLA operates as a self-supporting entity. That is, it retains its revenues and its profits, which are not passed on to the City but are used to operate the Port and to improve its infrastructure. Pet. App. 5a, 70a. And its revenues vary with the number of vessels and the amount of cargo leaving and coming into the Port. *Id.* at 72a, 120a-21a. Thus, for straightforward

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651 (2011), *available at* http://www.amlegal.com/library/ca/losangeles.shtml.

business reasons it seeks to maximize its infrastructure capacity to accommodate more vessel traffic and a greater volume of cargo. *Id.* at 72a-73a, 120a-21a.

In the late 1990s, the Port's management determined that in order to compete effectively with other ports in the future, when more and larger ships would be used on cargo routes, the Port would have to expand its facilities so as to be able to handle those ships. *Id.* at 6a. Its initial effort at expansion, however, was opposed by environmental groups, as well as by neighborhood groups whose residential property was located near the Port. *Id.* at 6a-7a, 75a-77a. That opposition, in which respondent Natural Resources Defense Council ("NRDC") was an active participant, was fueled by two facts.

The first is that the South Coast Air Basin, in which POLA is located, has one of the worst levels of air quality in the country, creating serious health hazards. *Id.* at 73a-74a. The second is that drayage trucks, which carry cargo to and from the Port's wharves, generally have been extremely high-polluting vehicles. Among other things, they have tended to be older than most long-distance trucks and therefore have had less effective pollution-control equipment than newer trucks. *Id.* at 75a, 87a. In addition, many persons living near the Port have long been concerned about the fact that drayage trucks often are used and parked on their residential streets, raising local air pollution, congestion, and safety issues. *Id.* at 87a-88a.

Opposition to POLA's first proposed expansion project resulted in litigation filed against the Port in 2001 by the environmental and neighborhood coalitions opposing that project. *Id.* at 6a, 76a. The litigation resulted in an injunction against POLA and, ultimately, a settlement that cost the Port approximately $80 million. *Id.* at 7a, 76a-77a. A second proposed expansion project was delayed by similar opposition and a threatened lawsuit, which was averted only by another costly settlement. *Id.* at 7a, 77a-78a.

In response to these setbacks, which threatened its planned expansion and thus its future economic and competitive success, in 2006 POLA – along with the adjacent Port of Long Beach ("POLB") – adopted a Clean Air Action Plan ("CAAP").[2] *Id.* at 7a, 79a. As the decision below put it:

> In the CAAP, the Port announced its intention to "grow green" and achieve a 45% reduction in total emissions by 2012. The Ports stated that they "recognize that their ability to accommodate the projected growth in trade will depend upon their ability to address adverse environmental impacts . . . ."

Id. at 7a-8a (quoting from CAAP).

---

[2] POLB was but is no longer a party to this litigation, as a result of a 2009 settlement with ATA. *Id.* at 61a n.2.

As a part of the CAAP, POLA introduced a Clean Truck Program ("CTP").[3] The CTP was designed to reduce drayage trucks' contribution to the polluted air at and near the Port that had thwarted its efforts to expand. *Id.* at 8a, 80a-84a. As part of the CTP, POLA developed a "concession contract" requirement whereby licensed motor carriers ("LMCs") that wished to operate drayage trucks at the Port would be required to enter into contracts with POLA containing certain specified provisions. *Id.* at 10a-13a, 85a-93a. Those provisions included the five that were at issue before the court below:

> 1. An off-street parking provision, requiring concessionaires to submit to the Port for approval an off-street parking plan for their trucks;
>
> 2. A placard provision, requiring carriers to post placards while on Port property, referring members of the public to a telephone number to report safety or emissions concerns;
>
> 3. A financial capability provision, requiring concessionaires to demonstrate that they possess the financial capability to perform their obligations under the contract;
>
> 4. A maintenance provision, requiring concessionaires to ensure that truck

[3] The CTP was not adopted as part of any California clean air regulatory regime.

> maintenance is conducted in accordance with manufacturers' instructions; and
>
> 5. An employee-driver provision, requiring concessionaires to transition over five years to using employee drivers rather than independent contractor drivers.

See id. at 12a-13a.

Separately from its adoption of the concession contract, which pertains to LMCs, POLA amended its Tariff No. 4 to require that MTOs admit to their leased premises at the Port only drayage trucks operated by LMCs that had executed concession contracts with the Port.[4] *Id.* at 12a, 83a-84a. This tariff provision by its terms applies only to MTOs, and not to LMCs:

> [N]o Terminal Operator shall permit access into any Terminal . . . to any Drayage Truck unless such Drayage Truck is registered under a Concession or a Day Pass from the Port of Los Angeles . . . .[5]

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[4] POLA's Tariff No. 4 sets forth the rates, charges, rules, and regulations for use of POLA's harbor. *See* Pet. App. 83a.

[5] A "day pass" is a temporary access permit that provides an alternative mechanism for entry into POLA's terminals. It is intended for use by LMCs who use the Port infrequently. *See* 4 C.A. E.R. 576.

In 2008, ATA instituted this litigation against the City of Los Angeles respondents, claiming that POLA's concession contract was invalid in whole or in part on two principal grounds.[6] First, ATA claimed, the concession contract was preempted by 49 U.S.C. § 14501 ("section 14501"), a provision enacted as part of the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569 ("FAAAA"), which is in part a trucking deregulation statute. Section 14501(c)(1) provides that no state or state entity may "enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." The defendants pointed out that section 14501 contains an exception in subsection(c)(2)(A), stating that the quoted preemption clause "shall not restrict the safety regulatory authority of a State with respect to motor vehicles" ("the safety exception"); and in addition to relying on that exception, they also asserted that POLA's concession contract requirement fell within the judicially created "market participant" exception to preemption. The second ground upon which ATA claimed preemption lay in its contention that the safety-related provisions of the concession contract conflict with this Court's decision in *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954), which

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[6] We leave aside for purposes of this description a claim by ATA that the concession requirement violated the dormant Commerce Clause. That claim was rejected by the District Court, Pet. App. 129a-36a, and was not appealed by ATA.

held that states were limited in the extent to which they could deny interstate motor carriers the use of state highways.

After ATA had pared down its attack on the concession contract to a challenge to the five specific provisions described above (as well as to the contract mechanism itself), and after preliminary injunction-related litigation involving two appeals to the Court of Appeals for the Ninth Circuit, the parties presented their evidence and arguments to the District Court for the Central District of California in a seven-day bench trial in 2010.[7] Pet. App. 60a. The District Court held that neither POLA's use of a concession contract mechanism nor any of the five challenged contract provisions was preempted, *id.* at 136a-37a, and ATA appealed. In doing so, ATA failed to challenge any of the District Court's findings of fact.

In the decision now under review, the Ninth Circuit held that one of the five relevant contractual provisions was preempted but that the other four were not. The Court of Appeals ruled that the

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[7] ATA's brief at times cites or quotes from the preliminary injunction decisions of the Ninth Circuit as if those decisions constituted definitive holdings of substantive law. *E.g.*, Pet. Br. 9-10, 23. Insofar as merits issues are concerned, however, the Court of Appeals' preliminary injunction rulings addressed only the parties' *likelihood* of success and thus expressed only tentative views based on the preliminary record available at the time. The decision currently under review – the Court of Appeals' ultimate determination on the merits of the case – of course reflects that court's actual ruling on the issues before it.

employee driver provision was preempted because it was outside the scope of the market-participant exception or doctrine and because it fell within the terms of the FAAAA's preemption language in section 14501, in that it related to the prices, routes, or services of LMCs. Pet. App. 41a-44a. That issue is not presently before the Court inasmuch as respondents did not ask this Court to review it.

The court below also held, however, that the financial capability provision of the concession contract, unlike the employee driver provision, did not relate to LMCs' prices, routes, or services in more than a "tenuous" fashion and hence was not preempted. *Id.* at 33a-34a. It also ruled for the same reason that POLA's general requirement that motor carriers seeking access to the Port enter into a concession contract was not preempted.[b] *Id.* at 19a-21a. And it held that the maintenance provision is "genuinely

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[b] The Court of Appeals explicitly rejected ATA's contention that, quite apart from "the effect of each individual provision of the concession agreements," the "requirement of a concession agreement *per se* affects routes and services" because it provides "POLA [the] ability to prohibit non-concessionaire LMCs from entering its property." Pet. App. 19a (quoting from ATA's brief). The court held that argument to be "foreclose[d]" by prior case law. *Id.* Thus, while the Court of Appeals mentioned the contract mechanism issue in discussing the market-participant doctrine generally (the Port acted in "its proprietary capacity as a market participant when it decided to enter into concession agreements," *id.* at 29a), ATA's attack on the concession mechanism was rejected on the ground that it did not affect LMCs' prices, routes, or services.

responsive to safety," *id.* at 34a-35a, and thus falls within the safety exception contained in section 14501(c)(2)(A). These rulings are also not before the Court. They were included as part of Question 2 set out in ATA's petition for certiorari, but the Court granted certiorari only as to Questions 1 and 3.

For purposes of the market-participant issue, therefore, the only two rulings below that are before this Court for review are (1) the holding that the off-street parking provision is shielded from preemption by the market-participant doctrine, and (2) the parallel holding that the placard provision is also so shielded from preemption. For present purposes it is with respect to those two provisions of POLA's concession contract only, therefore, that we address the market-participant doctrine.[9]

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[9] The Court of Appeals held that the placard provision fell within the safety exception to section 14501. Pet. App. 45a. It also analyzed that provision under 49 U.S.C. § 14506 ("section 14506"), however, which specifies that federal "identification" of motor carriers is exclusive and has no safety exception. With respect to section 14506, the court held that the placard provision was protected from preemption by the market-participant doctrine. Pet. App. at 45a-46a. Since the same preemption language (preempting state action having the "force and effect of law") is used in both section 14501 and section 14506, the market participant analysis set out below applies to both sections, as well as to both the placard provision and the off-street parking provision. No party has ever argued that a special market participant assessment is called for with regard to section 14506.

The Court of Appeals concluded as to those provisions, in the circumstances of this case and on the record created before the District Court, that:

> The Port necessarily requires the interrelated service of drayage trucking in order to transport . . . goods to customers or points of forwarding. The district court found [in findings not challenged by ATA] that . . . the "Port has a direct financial interest in the unhindered and efficient flow of cargo through its terminals and in increasing container traffic through the Port . . . ."

Id. at 27a-28a (quoting *id.* at 72a). On this basis, and on the basis of other unchallenged findings by the District Court, the Court of Appeals concluded as follows:

> Enhancing good-will in the community surrounding the Port is an important and, indeed, objectively reasonable business interest [of POLA], particularly since the community had already proved its ability to stym[ie] Port growth and operations by pursuing litigation over health hazards and environmental impacts.

Id. at 40a. Thus, the court held, adoption of the concession contract's off-street parking and placard provisions, which were intended to engender such goodwill and to facilitate the Port's expansion, reflected the conduct of the Port as a market participant

rather than as a regulator, so that those contract provisions are not preempted.[10] *Id.* at 38a-41a, 44a-46a. As support for this conclusion, the court below noted that, for business reasons, a "private port owner could (and probably would)" have acted in the fashion in which POLA acted with respect to those two provisions of the concession contract. *Id.* at 29a.[11]

As to *Castle*, finally, the Court of Appeals held that since the concession contract addressed only access to private state property (the Port) rather than to state highways generally, the decision does not govern the issues raised by ATA. *Id.* at 30a-32a.

II. THE MARKET-PARTICIPANT DOCTRINE

ATA's brief includes little if any analysis of the origin or purpose of the market-participant doctrine.

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[10] The Court of Appeals also found that the off-street parking requirement "serves the Port's business interest in promoting Port security." Pet. App. 40a-41a.

[11] Although ATA is able to pluck from the record occasional suggestions that other motivations may have been to some extent involved, *see, e.g.*, Pet. Br. 11, JA93-94, there is no doubt that POLA's essential reason for adopting the concession contract was commercial, as all of the quotations from the opinions of the District Court and the Court of Appeals set out herein demonstrate. Certainly, the effort in one *amicus* brief to attribute to POLA views that were merely discussed in the report of a consultant retained by the Port prior to adoption of the concession contract is without foundation. *See* Brief *Amicus Curiae* of Center for Constitutional Jurisprudence and Harbor Trucking Association in Support of Petitioner at 3, 9-10 (Feb. 22, 2013).

We believe that a brief discussion of those issues is important as background for assessing the doctrine's applicability here.

The doctrine was first articulated by this Court in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). There, the state of Maryland sought to reduce the number of abandoned, inoperative vehicles ("hulks") within its borders by awarding monetary "bounties" to scrap processors who came into possession of such hulks. Certain of this scheme's requirements were especially onerous for non-Maryland scrap processors, and one such processor challenged the plan as violating the negative or dormant Commerce Clause. The Court upheld the Maryland statute, however, on the ground that it did not involve "regulation":

> Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price.

426 U.S. at 806. And the Court continued:

> Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.

Id. at 810.

Hughes was followed by *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). In *Reeves*, the state of South Dakota

owned and operated a cement plant and, in a time of shortage, discriminated in favor of in-state and against out-of-state purchasers. This Court found that the state was a market participant and that "there is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." 447 U.S. at 437.

Nor has the Court's application of the market-participant doctrine been limited to Commerce Clause cases. The doctrine was held to protect from preemption under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"), a state entity's plan for dealing with labor issues, *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 232-33 (1993) (the "*Boston Harbor*" decision), and application of the doctrine to other federal statutes is discussed below.

SUMMARY OF ARGUMENT

The Court should affirm the Court of Appeals' decision as to the issues before it. The Port's concession contract was motivated by commercial rather than by regulatory concerns and thus falls squarely within the market-participant exception to preemption. This is especially true of the only two contract provisions upheld below on the basis of that exception – the parking provision and the placard provision. These conclusions rest on factual findings by the

District Court that were not challenged on appeal by ATA.

ATA's arguments in favor of preemption ignore basic holdings by this Court to the effect that, absent a statement of clear congressional intent to the contrary, the courts should presume that proprietary state conduct dealing with management of state-owned property is within the market-participant doctrine. Those arguments also ignore and in fact contradict uniform authority allowing application of that doctrine in situations, like this one, involving express statutory preemption. Indeed, the case law uniformly authorizes, contrary to ATA's contention, application of the market-participant doctrine in FAAAA cases. The pertinent decisions also indicate that POLA's concession contract does not (in the language of section 14501) have the "force and effect of law." That conclusion is fortified, additionally, by the concession contract's reference only to contractual remedies for any breach and by the fact that POLA's tariff – which according to ATA gives the contract the "force and effect of law" – applies in relevant part only to MTOs, not to LMCs, so that LMCs cannot be penally liable for violating the provisions of a concession contract.

The bases for ATA's argument that any market-participant exception to FAAAA preemption here should exclude POLA's concession contract (for example, because the program does not involve procurement or because the Port supposedly does not participate in a "drayage market") are based on

unjustifiably narrow readings of judicial authority defining the contours of the exception. Finally, *Castle* – which has implications only for the contract's maintenance provision or, at most, that provision and the placard provision – is no longer good law in light of the trucking deregulation that has occurred since it was decided. In any event, its application here is unjustified where only access to state-owned property (rather than state highways) is at issue, and would produce consequences contradicting fundamental legal canons concerning statutory construction.

ARGUMENT

I. THE MARKET-PARTICIPANT DOCTRINE SHIELDS FROM PREEMPTION THE OFF-STREET PARKING AND PLACARD PROVISIONS, THE ONLY PROVISIONS OF THE CONCESSION CONTRACT HELD TO FALL WITHIN THE DOCTRINE

As we have described, the only aspects of the Port's concession contract held by the court below to be protected from preemption by the market-participant doctrine are the off-street parking and placard provisions. As a consequence, this Court has no reason to assess whether the mechanism of a concession contract (apart from its content) is within the market-participant doctrine. *See* pp. 9-10, nn.8-9, *supra*. As we have also outlined, the contract mechanism and the other three provisions of the concession

contract – the maintenance provision, the financial capability provision, and the employee driver provision – were held either to be preempted (in the case of the employee driver provision) or not to be preempted on grounds not implicating the market-participant doctrine.

A. The FAAAA's Express Preemption Language Does Not Foreclose Application of the Market-Participant Doctrine, the Existence of Which is Confirmed by Uniform Case Law

ATA's principal argument against application of the market-participant doctrine here consists essentially of three steps. First, says ATA, section 14501 is an express rather than an implied preemption provision, so that law governing application of the doctrine to implied preemption situations is distinguishable. Second, the scope of preemption with respect to express preemption statutes is determined by the intent of Congress, which in turn is determined principally by its language. Third, the relevant language here – "force and effect of law" – covers the Port's concession contract. Therefore, ATA concludes, there is no room for a market-participant exception from preemption under the terms of the statute, which does not expressly provide for one. Pet. Br. 19-25.

The central difficulty with ATA's argument lies in its third step and in the logic leading to its

conclusion. ATA asserts that the concession contract has the "force and effect of law," and it similarly asserts, without any citation, that there can be no market-participant exception to an express preemption provision like section 14501 unless the pertinent statutory language specifically provides for one. Unless both of those propositions are correct, ATA's contention fails. But in fact both propositions are incorrect.

As an initial matter, consider ATA's argument that the "plain language" of the "force and effect of law" provision shows that it covers POLA's concession contract. The first striking puzzle about this contention is that the language in question is one of limitation. That is, not all state action is preempted by section 14501 – only state action having the "force and effect of law." Far from indicating an intent to preempt broadly something like the Port's concession contract requirement, that language instead suggests a more restricted intent to preempt only some state action.

For present purposes it is not difficult to determine what sort of state action Congress's language was intended *not* to preempt. To begin with, *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 229 n.5 (1995), construing identical language in the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 ("ADA") (after which, ATA emphasizes, the FAAAA was modeled), concludes that the phrase "force and effect of law" is "most naturally read to refer to binding standards of conduct that operate

irrespective of any private agreement." (Internal quotation marks omitted.) The concession contract is just such a "private agreement."

Just as importantly, the FAAAA was enacted a year after *Boston Harbor*, which laid down a presumption as to whether a statute preempts a state's activities as a market participant: "In the absence of any express or implied indication by Congress that a State may not *manage its own property* when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction." 507 U.S. at 231-32 (emphasis added). Thus, *Boston Harbor* created a rule providing that, in the absence of a clear indication of congressional intent to the contrary, courts should presume that Congress did not intend to preempt a state entity's proprietary action. As the quoted language makes clear, moreover, this principle is quintessentially applicable where a state entity owns and manages its own property – the sort of situation in which the entity necessarily has to have some control over entry onto that property.[12]

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[12] The necessity of at least some state control over entry onto property that it owns is self-evident but is illustrated by pre-ADA law governing airports, discussed below. In *Griggs v. Allegheny County*, 369 U.S. 84, 89-90 (1962), this Court held that a municipal airport proprietor could be held liable for taking the property of nearby residents on the basis of excessive takeoff and landing noise. Accordingly, the courts held that such municipal airports had authority, despite federal regulation of air transportation, to limit entry of aircraft, setting restrictions based (for example) on noise levels and the time of day. *See, e.g.*,

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Congress presumably was aware of this *Boston Harbor* principle in enacting the FAAAA, so that it knew it was not creating a prohibition on state proprietary activities; but in any event, *Boston Harbor* requires that the language of that statute be so interpreted. *See also Johnson v. Rancho Santiago Cmty. College Dist.*, 623 F.3d 1011, 1022 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2096 (2011) (market-participant doctrine "offers us a presumption about Congress's purposes. In general, Congress intends to preempt only state regulation, and not actions a state takes as a market participant"). In short, contrary to ATA's assertion that the "plain language" of the FAAAA's "force and effect of law" language somehow necessarily covers state action such as POLA's concession contract requirement, that language, "by excluding government actions without the force of law . . . *seems to invite*" a "proprietary analysis." *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 695 (5th Cir. 1999) (emphasis added).

Nor is the presumption somehow different in the case of express preemption statutes, as ATA argues. Although *Boston Harbor* involved implied preemption under the NLRA, its presumption applies, in the Court's own language, to "express *or* implied" indications of Congress's intent to preempt state proprietary action and so applies to express preemption

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National Aviation v. City of Hayward, 418 F. Supp. 417, 420-22 (N.D. Cal. 1976) (citing *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635 n.14 (1973)).

provisions that say nothing about such action. *See* 507 U.S. at 231-32 (emphasis added). *See generally Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law").[13]

This analysis is confirmed again and again in governing case law not mentioned by ATA. Although ATA fails to make the Court aware of any of them, there are numerous decisions holding that the market-participant doctrine is applicable to an express preemption provision despite the absence of any statutory language indicating that the doctrine should be applied.

The Employee Retirement Income Security Act ("ERISA"), for example, contains an express preemption provision, displacing all state action relating to employee benefit plans if such action has "the effect of law." 29 U.S.C. §§ 1144(a), (c). Under ATA's logic, there can be no market-participant exception to preemption under ERISA, because ERISA involves express preemption and because the statutory language – which is strikingly similar to that of the FAAAA – does not, ATA would say, suggest the applicability of the exception. But in fact the case law

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[13] Although ATA suggests that *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), is the pertinent backdrop against which enactment of the FAAAA should be considered, Pet. Br. 27, *Morales* – which, like *Wolens*, addressed the ADA – was not even a market-participant decision.

uniformly holds that there is indeed a market-participant exception to ERISA preemption. *See, e.g., Associated Gen. Contractors of Am. v. Metropolitan Water Dist.*, 159 F.3d 1178, 1183-84 (9th Cir. 1998); *Colfax Corp. v. Illinois State Toll Highway Auth.*, No. 93-7463, 1994 WL 444882, at *6 (N.D. Ill., Aug. 16, 1994), *aff'd*, 79 F.3d 631 (7th Cir. 1996); *Lott Constructors, Inc. v. Camden Cnty. Bd. of Chosen Freeholders*, No. 93-5636, 1994 WL 263851, at *18-19 (D.N.J. Jan. 31, 1994). We are aware of no decision, in fact, that rejects the existence of a market-participant exception in an ERISA context.

ATA notes that the "FAAAA provides several statutory exceptions to its broad preemption scheme," Pet. Br. 25, referring to exceptions such as the safety exception. *Id.* at 25-26. On this basis, it argues that the "presence of those carefully crafted statutory exceptions forecloses any inference that the FAAAA also contains another, unstated exception" – *i.e.*, the market-participant exception. *Id.* at 26. But as ATA once again fails to inform the Court, every judicial decision considering whether there exists a market-participant exception to the FAAAA's preemption provision has concluded that there is – a result directly contrary to the contention urged by ATA. We know ATA is aware of such decisions, because in its petition for certiorari it conceded that case law has "recognized [a] market-participant exception to the

FAAAA." Pet. 15.[14] ATA cited in this respect *Cardinal Towing*, 180 F.3d at 693, *Petrey v. City of Toledo*, 246 F.3d 548, 559 (6th Cir. 2001) (same), and *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1048-50 (9th Cir. 2000), *cert. denied*, 531 U.S. 1146 (2001) (same).[15]

This uniform case law under the FAAAA provides definitive refutation of ATA's argument that the "plain language" of section 14501 precludes the existence of a market-participant exception to preemption under the FAAAA.[16] The decisions vary in

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[14] ATA sought to explain away those decisions in its petition for certiorari by noting that they involved nonconsensual towing. Pet. 15. But ATA has failed to provide any reason why that fact should be relevant to the existence of a market-participant exception under the FAAAA.

[15] At page 23 of its brief ATA seeks to inject some uncertainty into the case law by citing and quoting from what it concedes is "the first Ninth Circuit panel" to address the preliminary injunction phase of this case. *See* Pet. App. 225a-26a. As we have explained, however, that panel merely addressed likelihood of success in the context of a preliminary record, and the Ninth Circuit decision currently under review, which rejects ATA's position, constitutes the Court of Appeals' actual resolution of the market-participant issue based upon the full trial record.

[16] ATA points to *City of Charleston v. A Fisherman's Best, Inc.*, 310 F.3d 155, 178-79 (4th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003), which held that no market-participant doctrine was applicable to the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.* (which addresses fishing issues). Not only is the Magnuson-Stevens Act quite a different statute from the FAAAA and the ADA, however, but the court's opinion in that case fails to apply the principle of *Boston Harbor* that a congressional intent to preserve state proprietary action free from preemption should be presumed. The opinion's analysis may also be found severely wanting inasmuch as it fundamentally

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the language they use and the approach they take to reach the conclusion that there is such a market-participant exception. At times they state that the market-participant doctrine *informs* the interpretation of the phrase "force and effect of law," so that that language itself excludes state proprietary action. *See Cardinal Towing*, 180 F.3d at 691 (defendant contends that "market participation . . . does not constitute a law, regulation, or provision having the force and effect of law under section 14501(c). We agree"). In some instances, however, the decisional language suggests that even if a given state action does have the "force and effect of law," it is nonetheless subject to a presumed market-participant exception. *See Tocher*, 219 F.3d at 1049 ("Although the plain ['force and effect of law'] language of the statute would appear to encompass [the municipal conduct at issue], it is saved from preemption by the municipalproprietor exception (also called the market participant exception) to the preemption doctrine").[17]

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mischaracterizes *Cardinal Towing*, incorrectly referring to it – twice – as a decision involving ERISA rather than the FAAAA. 310 F.3d at 178. Judge Luttig's dissent offers an analysis much more in keeping with the *Boston Harbor* presumption. *Id.* at 182-83.

[17] It was from this perspective that we stated in our opposition to ATA's petition for certiorari that whether a measure "falls within the ['force and effect of law'] language" does not necessarily "mean that the measure is regulatory or that the market participant doctrine otherwise does not apply." POLA Cert. Br. 13. Given the frequently used first approach to the meaning of that language, we of course do not concede that POLA's concession contract provisions in fact have the "force and effect of law" as that phrase is used in section 14501.

Either approach may fairly be thought to reflect the presumption established by *Boston Harbor*, though the first may be more generally stated in the case law. Regardless of which perspective is adopted, however, the conclusion is the same: action taken by a state entity in "managing its property" and otherwise acting in a proprietary fashion is not preempted by the "force and effect of law" language of section 14501.[18]

In light of the uniform case law under the FAAAA, ATA's reliance on the existence of an explicit "proprietary" exception in the ADA, after which the FAAAA was patterned, is of no consequence. The ADA's exception states that the statute's preemption provision shall not prevent a state entity owning or operating "an airport . . . from carrying out its proprietary powers and rights." 49 U.S.C. § 41713(b)(3). The absence of any such provision in the FAAAA indicates, according to ATA, that the FAAAA contains no market-participant exception to preemption.

But the cited provision deals specifically, in the language of several decisions, with problems of airport noise pollution and environmental concerns. *E.g.*, *National Helicopter Corp. of Am. v. City of N.Y.*,

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[18] In this respect ATA's reference to POLA's Tariff No. 4, which speaks of the responsibilities of MTOs – not LMCs – in connection with concession contracts, Pet. Br. 20-21, for multiple reasons does not assist its "force and effect of law" argument. The same is true of its observation that the tariff may be enforced criminally. *Id.* This general issue is discussed at length at pp. 39-42, *infra*.

137 F.3d 81, 88-89 (2d Cir. 1998). This specific focus stems from pre-ADA law making state and municipal airport owners liable for noise and related pollution that affected the airports' neighbors and reflects a congressional intent not to alter pertinent law predating the ADA. *See, e.g., British Airways Bd. v. Port Auth.*, 558 F.2d 75, 82-84 (2d Cir. 1977).

Given that there was no equivalent to airports as to truck transportation – there are no "truckports," and no truck-related controversies involving seaports had at the time arisen – the absence of a cognate exception in the FAAAA is not surprising and says nothing about Congress's market-participant intent in passing the FAAAA. Indeed, the *Boston Harbor* requirement that an intent to preempt state proprietary action should not be found in the absence of a clear indication of such an intent by Congress directly undercuts ATA's contention that some negative implication should be drawn from the absence of a proprietary noise/environmental exception in the FAAAA. Moreover, at least one leading ADA decision suggests that there are two separate proprietary exceptions to preemption under that statute – the market-participant gloss on the meaning of "force and effect of law" as well as the more specific proprietary action exception relied upon by ATA. *American Airlines, Inc. v. Department of Transp.*, 202 F.3d 788, 806-808, 810 (5th Cir. 2000), *cert. denied*, 530 U.S. 1284 (2000). In any event, as we have noted, ATA's contention runs counter to every FAAAA preemption decision issued by any federal court of which we are aware.

Of even less help to ATA is the fact, pointed to in its brief, that in certain other far different statutes Congress inserted something like a market-participant exception. *See* Pet. Br. 27-28. The provisions cited by ATA, however, only address purchases "for [the state's] own use." *See* 15 U.S.C. §§ 2075(b), 1203(b), 1476(b); 49 U.S.C. §§ 30103(b)(1), 32919(c), 32304(i)(2). Accordingly, they reflect a reach narrower than that of the market-participant doctrine, which applies to state conduct not reflecting any procurement (*Hughes*) or, indeed, to state action in selling rather than buying products (*Reeves*). The *amicus* brief filed by the United States similarly rejects ATA's argument with respect to these statutes and supports the existence of a market-participant exception to the FAAAA. U.S. Br. 15-19.

Morales, also relied upon in this respect by ATA, Pet. Br. 27, similarly is of no significance. There, the Court rejected a contention that the ADA's preemption language, which precludes states from taking certain actions that "relate to" rates, routes, and services, preempted states only from "actually prescribing rates, routes, or services." 504 U.S. at 385. While true, therefore, it is of no relevance that under the rejected contention no purpose would have been served (as ATA observes) by the ADA provision preserving to the states proprietary rights over airports. And the Court's rejection of a "public health" exception to FAAAA preemption in *Rowe v. New Hampshire Motor Transportation Association*, 552 U.S. 364 (2008), is of no import given the fact that no health exception

has ever been recognized in any preemption context and is not at issue here. *See* Pet. Br. 26.

Wolens, which ATA also cites, actually undercuts its position. *Wolens* first of all was not a market-participant decision, and in any event laid down a definition of "force and effect of law" under which that language means "binding standards [not based on] *private agreement*." 513 U.S. at 229 n.5 (emphasis added). That definition is not one on which ATA can rely. No LMC is "bound" by the concession requirement unless it agrees to be so bound in a "private agreement" with POLA. Otherwise it is free to ignore the requirement and to service other ports or destinations.

B. POLA's Adoption of Its Concession Contract Provisions Falls Within the Market-Participant Doctrine

1. ATA's Fallback Argument Regarding Application of the Market-Participant Doctrine to the Facts of this Case Is Flawed

ATA's second principal contention is that even if the FAAAA includes a market-participant exception, no such exception can save the actions taken by the Port here from preemption. Pet. Br. 29. None of its arguments in support of this position is persuasive.

First, ATA contends, "every time this Court has recognized a market-participant defense in a preemption context, it has limited the exception to state

actions aimed at the efficient procurement of goods and services or at the use of state-allocated funds." *Id.* at 30. But not only does ATA fail to cite any decision holding the market participation doctrine inapplicable with respect to a governmental entity's use of state-owned property to conduct a business; in addition, its contention simply ignores the reality of key market-participant decisions by this Court (which it also fails to cite). *Reeves,* for instance, involved no procurement of goods or services at all, efficient or otherwise. The South Dakota conduct at issue there involved sales of goods (cement), not procurement.

The court below had it exactly right in concluding that the procurement-related standard articulated and applied in *Cardinal Towing* and later cases (cited by ATA), *see* Pet. Br. 30-32, "is useful . . . where the government is buying goods or seeking services, but it is not the be-all-and-end-all of proprietary action." The more basic question in applying the market-participant doctrine is "whether the challenged program constitute[s] direct state participation in the market . . . ." Pet. App. 25a (quoting *White v. Massachusetts Council of Constr. Emp'rs, Inc.*, 460 U.S. 204, 208 (1983)). As for ATA's reference to the "use of state-allocated funds," its brief invokes principally *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60 (2008). Pet. Br. 30-31. But in *Brown*, California prohibited employers receiving state funds from using those funds to promote or oppose unionization, and the Court's holding rested on the challenged statute's explicit acknowledgement that the state's purpose was "the furtherance of a labor policy" rather than a commercial

objective. 554 U.S. at 70. Here, by contrast, the District Court found, and the Court of Appeals affirmed, that POLA's adoption of the pertinent provisions of the concession contract was based on a commercial motivation rather than on a regulatory effort to further any state "policy." *See generally* Pet. App. 25a-28a, 117a-23a.

Next, ATA states that the court below upheld POLA's concession contract requirement on the supposed ground that "a State acts as a market participant whenever it does something that a private party could do." Pet. Br. 31. Attribution of such reasoning to the Court of Appeals is baseless. The Court of Appeals simply ruled that one factor supporting its conclusion that the relevant aspects of the concession contract fall within the market-participant doctrine was that the Port acted, for business purposes, in the same way a "private port owner could (*and probably would*)" have acted – *i.e.*, by "enter[ing] into concession-type agreements with [LMCs] . . . to further its [business] goals." Pet. App. 29a (emphasis added) (citing *Boston Harbor*, 507 U.S. at 231-32). Many private corporations, including Wal-Mart, Proctor & Gamble, and Patagonia, have adopted "green growth" plans like the Port's CAAP, and a recent survey of business managers reveals that the great majority believe that such plans are either now or will soon be necessary for competitive reasons. *See* NRDC Cert. Br. 17-20.

The Court of Appeals' decision hence merely rests in part on its well-supported conclusion that POLA followed a course of business action that a private port owner "probably would" have followed. ATA's

assertion that following such logic would "create[ ] an exception that swallows the FAAAA's deregulatory scheme," Pet. Br. 32, is refuted by the Court of Appeals' own conclusion, reached on the basis of its approach to the market-participant doctrine, that the concession contract's employee driver provision did *not* fall within the scope of the doctrine because it reflected thinly veiled regulation designed to affect not just LMCs (the parties to the contracts) but also third parties – drayage truck drivers. *See* Pet. App. 41a-44a. If a state commercial entity follows a course of action that private business "probably would" have followed, that is good reason to doubt that inclusion of its conduct within the market-participant doctrine would somehow create an open-ended exception to the doctrine's requirements.

Finally, ATA challenges the decision below on the ground that the "Port is not a participant in the drayage market." Pet. Br. 32 (emphasis omitted). ATA thus suggests that the market-participant doctrine applies only to actions taken within a given "relevant market" – *i.e.*, the market within which the state actor participates. But no market-participant decision has ever engaged in the sort of painstaking relevant market definition that is a staple of the everyday application of antitrust law. *See, e.g.*, ABA Section of Antitrust Law, Antitrust Law Developments 567-631 (7th ed. 2012). And the cases from which recent market-participant decisions draw their principal contours belie the notion that any "relevant market" analysis is necessary. *Hughes* asked merely whether Maryland was a participant in "the market," 426 U.S.

at 806, and *Reeves* similarly assessed simply whether South Dakota was an actor in "the free market." 447 U.S. at 437. *White*, 460 U.S. at 211 n.7, specifically added, in fact, that application of the doctrine does not turn on whether there is "privity of contract" among the relevant actors.

The only decision of this Court cited by ATA regarding this issue is *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). In *Wunnicke*, Alaska's action in restricting the processing options of purchasers of the state's timber – by requiring that the timber be processed in-state prior to export – was at issue. A plurality of four Justices concluded that the state's efforts did not fall within the market-participant doctrine because they involved "downstream" restrictions, including restrictions against foreign processing of the timber sought by a plaintiff purchaser. But that was not the Court's holding in *Wunnicke*, inasmuch as two Justices of the eight-Justice Court concurred in the result on narrower grounds, without analyzing the market-participant doctrine, while the other two dissented. Hence the Court's holding was determined by the views of the two concurring Justices, who based their opinion on statutory rather than market-participant grounds. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest

grounds") (internal quotation marks and citations omitted).

In any event, there is no "downstream" reach to the concession contract provisions at issue, since the contract reflects the relations of the Port and LMCs only. At most, any downstream effects were removed from the concession contract when the Court of Appeals held that the employee driver provision was preempted on the ground that it directly affected, by its terms, third parties – *i.e.*, the drivers of drayage trucks. As three Justices have recognized, moreover, the plurality opinion in *Wunnicke* "expressly applied 'more rigorous' Commerce Clause scrutiny [than might otherwise have been warranted] because the case involved 'foreign commerce' and restrictions on the resale of 'a natural resource.'" *Department of Revenue v. Davis*, 553 U.S. 328, 348 n.17 (2008) (plurality, quoting *Wunnicke* plurality opinion, 467 U.S. at 96, 100). *See also Reeves*, 447 U.S. at 438 n.9 ("Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged").

ATA relies on the Eleventh Circuit's recent decision in *Florida Transportation Services, Inc. v. Miami-Dade County*, 703 F.3d 1230 (11th Cir. 2012). There, the court held that efforts by the Port of Miami to restrict the number of stevedores working at the port did not fall within the market-participant doctrine because the port "[did] not provide stevedore services"

and thus did not participate in a vaguely defined "stevedore market." *Id.* at 1262.[19] But *Florida Transportation*'s market-participant holding, consisting in its entirety of three paragraphs, was based on precedent binding in the Eleventh Circuit – *Smith v. Department of Agriculture*, 630 F.2d 1081 (5th Cir. 1980), *cert. denied*, 452 U.S. 910 (1981).[20] In *Smith*, the court held that Georgia's management of a farmers' market fell outside the scope of the market-participant doctrine. The United States (along with the respondents herein) convincingly distinguished *Smith* at the certiorari stage. U.S. Cert. Br. 12-13.

Moreover, the holding in *Smith* was explicitly rejected by the Eighth Circuit in *Four Ts, Inc. v. Little Rock Municipal Airport Commission*, 108 F.3d 909, 912-13 (8th Cir. 1997). There, an airport that contracted with and provided counter space and parking spaces to a car rental company was held to be a participant in a loosely defined "rental car market" and hence to be within the market-participant doctrine. This was despite the fact that the airport did not purchase or provide car rental services. *See also*

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[19] Miami-Dade County has stated that it will seek review by this Court of the Eleventh Circuit's market-participant holding. *See* Appellant's Motion for Stay of Mandate Pending Petition for Certiorari, Nos. 11-10475 and 11-11116 (11th Cir. Feb. 28, 2013).

[20] The Port of Miami's action apparently did not rest on any business justification, but rather was based on "protectionist motivation[s] . . aimed to prevent competition against incumbent stevedores." 703 F.3d at 1257-58.

Transport Limousine of Long Island, Inc. v. Port Auth., 571 F. Supp. 576, 581 (E.D.N.Y. 1983) (port authority likewise participated in a "market for ground transport services" because it provided facilities at airports to limousine transport companies for a fee).

A sensible reading of the "market" analysis of *Four Ts* and *Transport Limousine* suggests that the governmental entities in those cases fell within the market-participant doctrine because they were securing ground transportation facilities and services for airport passengers, thus helping to achieve their business objectives. Under this analysis, POLA is a participant in a roughly defined drayage market because it provides facilities and port services and, through its concession contract, is securing drayage services that it needs in order for the Port to fulfill its essential business functions. *See* Pet. App. 27a ("The Port necessarily requires the interrelated service of drayage trucking in order to transport . . . goods to customers or points of forwarding"). In addition, it is important that, as the District Court found, POLA has helped to fund approximately 35 percent of the drayage fleet servicing the Port, helping LMCs to procure new, clean trucks, and has in fact purchased a modest number of electric drayage trucks for potential future use at the Port's facilities. Pet. App. 90a-92a. These facts show that POLA is intimately involved in local drayage and convincingly distinguishes the Eleventh's Circuit's *Florida Transportation* decision, where the Port of Miami did not finance or otherwise participate in stevedoring.

At the end of the day, any "relevant market" aspect of the market-participant doctrine should be resolved on the basis of the essential purpose of the doctrine. That purpose, as we have seen, is to shield from preemption activities of a state entity that do not constitute "regulation" but that instead are carried on for business purposes. It may well be that issues concerning exactly what market such an entity participates in are of no particular consequence, given the lack of any principles, articulated in any market-participant decision, governing definition of such "markets" and given the multiple references in this Court's market-participant jurisprudence to simple terms such as "the market" or "the free market."

Even if those issues are germane, however, we submit that, as the *Four Ts* and *Transport Limousine* decisions suggest, the key issue as to market participation should be whether the pertinent goods or services are an important part of the business conducted by the state entity in question (as lumber processing was not part of Alaska's timber-sale business in *Wunnicke*). Just as securing ground transportation to service airport passengers is essential to an airport's successful operation of its business, so too is the securing of drayage services critical to POLA's successful operation of its commercial enterprise: "[A] supply of drayage trucks . . . is integral to cargo movement at the Port." Pet. App. 28a.[21] Hence no

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[21] The fact that a state entity acts as a private business would have acted of course provides persuasive evidence that the entity is addressing products or services that are important to its operation.

concern as to market definition should obscure placement of POLA's concession contract within the zone of business activities covered by the market-participant doctrine.

Finally, ATA expresses a fear that the decision below would lead to a "patchwork" of different rules applicable at various ports, a result at odds, it says, with an important purpose underlying the FAAAA – *i.e.*, to prevent such differences by providing a uniform (though minimalistic) federal system for trucking regulation. This fear – not echoed by the United States – is at a minimum greatly exaggerated and in fact is not a genuine concern.

This is principally because the decision below turns on the facts specific to this case – the need and efforts by POLA to expand in order to remain competitive, the litigation brought by opponents that frustrated the planned expansion, and the resulting CTP and concession contract, designed to serve POLA's business interests rather than any regulatory purpose. It is fair to doubt that many other ports will be able to show such persuasive background circumstances calling for application of the market-participant doctrine – and any that could do so presumably would be entitled to the protection of the doctrine. Additionally, drayage trucks are generally short-haul trucks unlikely to service more than one port except in the unusual circumstance in which two ports are located very close to one another (as is the case with POLA and POLB). In short, this case should be decided on

the basis of its own facts, not out of excessive concern about a conceivable problem that might never come into existence and the effect of which is unknowable.[22]

2. The Position of the United States as to the Market-Participant Doctrine's Application Here Consists Merely of an Admittedly Incomplete List of "Considerations" That Are in Part Hypothetical Rather than Reflecting the Essential Facts of this Case

We now address the position expressed in the brief of the United States as *amicus*. As we have already noted, the United States rejects ATA's position that there is no market-participant exception under the FAAAA. None of the points ATA makes in this connection, including the express nature of

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[22] Moreover, in a sense truckers have always had to conform the provision of their services to limits imposed by major commercial actors to whom they provide services. Thus, for example, shopping centers, private communities, and multi-company industrial sites frequently limit deliveries to specific times during the day and to specific entry points. They may further require trucks to check in with security personnel or to post on their windshields visitor identification. In that sense, truckers already must comply with a "patchwork" of site requirements when making deliveries to or pick-ups from specific customers doing business at those sites. To be sure, such requirements are nongovernmental, but their existence should not be ignored in weighing the practical force of ATA's "patchwork" contention.

FAAAA preemption, the existence of certain explicit exceptions to FAAAA preemption, and the fact that the ADA (after which the FAAAA was modeled) contains an explicit "proprietary" exception for state and locally owned airports, is significant in the view of the United States. Nonetheless, the United States concludes that POLA's concession contract does not fall within the market-participant doctrine. This is because, focusing on one side of the analysis, the United States notes certain "considerations" that it believes support rejection of the market-participant doctrine's application here.

First, it notes that the Port's Tariff No. 4 refers to the concession agreement and that the tariff is "penally enforceable." U.S. Br. 22. However, this point is without force. Nowhere does the tariff state that an LMC shall enter into a concession or that an LMC with a concession may not breach it, nor does it provide for any criminal penalties against an LMC who fails to enter into a concession contract or who enters into one and breaches it. In fact, the only alleged connection between the penally enforced tariff and the concession agreement identified by the United States is grounded in a provision that explicitly applies only to "[Marine] Terminal Operator[s]," requiring that they "permit access" to their leased property only to trucks owned by LMCs who have entered into a concession. *Id.* An LMC cannot violate a requirement imposed only on MTOs and therefore cannot be criminally penalized. The Port's remedies for breach of a concession contract provision are set

forth, moreover, in the contract itself – specifically, the concession contract's default and termination provisions. *See* JA73-83. Nothing in those provisions – and nothing in the concession contract as a whole – suggests that breaches of concession requirements constitute crimes subject to enforcement via the criminal penalties set forth in the tariff. Accordingly, any contention that an LMC's failure to comply with concession requirements can give rise to criminal penalties is without merit.[23]

The United States admits that it is "not clear" a "breach of the [concession] agreement would constitute a crime." U.S. Br. 22. But to say that is to understate the point: as we have explained, there is no reason to believe that an LMC could violate the tariff by breaching a concession contract provision, much less "commit a crime" by doing so. Certainly the United States cites no provision of the tariff suggesting otherwise. Nor does it acknowledge more recent authority holding, contrary to *dictum* in *Washington State Building & Construction Trades Council v.*

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[23] ATA has stated below that it is not challenging the progressive truck ban requiring over time that LMCs use newer, less polluting trucks at the Port. *See, e.g.*, ATA Statement of P. & A. in Supp. of Mot. for Summ. J. 13 n.2 (C.D. Cal. Dec. 9, 2009), ECF No. 235. If the relevant tariff provision is deemed to confer on the concession contract the "force and effect of law" for purposes of section 14501, however, then the truck ban, which is also embedded in the tariff, 4 C.A. E.R. 580-81, could perhaps also have such force and hence could be preempted. Thus, ATA's suit may be viewed as a potential stealth attack by ATA on the truck ban and its favorable environmental results.

Spellman, 684 F.2d 627, 631 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) – the only decision cited by the United States in this regard – that the existence of criminal penalties for violation of a given state or local requirement does not necessarily remove such a requirement from the market-participant doctrine.

In *Engine Manufacturers Association v. South Coast Air Quality Management District*, 498 F.3d 1031 (9th Cir. 2007), the Ninth Circuit – the same Circuit that earlier decided *Washington State Building & Construction* – considered this issue and held as follows:

> [A]ppellants contend that the Fleet Rules [the relevant state program] are regulatory rather than proprietary because they are enforceable by criminal sanctions and fines. However, Appellants do not explain why such enforcement provisions preclude the application of the market participant doctrine.

498 F.3d at 1048. And the court concluded that the Fleet Rules "clearly constitute proprietary action within the meaning of the market participant doctrine." *Id.*

> We do not believe that the enforcement provisions have the effect of transforming the Rules from proprietary to regulatory action. . . . [W]e do not see how action by a state or local government that is proprietary when enforced by one mechanism loses its

> proprietary character when enforced by some other mechanism.

Id. To be sure, *Engine Manufacturers* addresses procurement conduct, but its reasoning and holding are applicable whenever a state or local commercial provision is, absent the existence of criminal penalties, within the market-participant doctrine. *See also Cardinal Towing*, 180 F.3d at 690 (holding that an "ordinance" fell within the doctrine).

The second factor mentioned by the United States is its view that "a container port is far more akin to publicly managed transportation infrastructure, like a highway or a bridge, than to an ordinary commercial operation." U.S. Br. 23. For that reason, the United States asserts, the concession agreement "resembles a license more than an arms-length commercial contract." *Id.*

The key point to consider in assessing this contention is that the United States cites no authority to support it. It cites no support for the notion that the concession contract resembles a license more closely than it resembles an "ordinary commercial operation," that a "license" cannot be a feature of a commercial operation,[24] or that the market-participant

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[24] Some municipal "franchise" licenses may be invalid if they are unrelated to governmental proprietary activity and seek merely to further a public policy. *E.g.*, *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 618-19 (1986) (taxi franchise). However, as the Court observed in *Boston Harbor*, 507 U.S. at 227, *Golden State* involved no proprietary conduct by

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doctrine is inapplicable to a commercial operation that is for some reason viewed as not "ordinary." And although the United States concedes that the Port faces competition from other ports, it seeks to minimize the importance of that factor by stating that:

> [I]t is common for regulatory agencies, such as agencies overseeing industrial development, to compete in this sense with counterpart agencies of other governments to attract investment to their region.

Id. But this statement ignores the fact that the Port is admittedly a commercial enterprise, not a state "agency" trying generally to "attract investment." Commercial enterprises do not try to attract investment "to their region" – they take whatever measures are thought useful in maximizing their profits and promoting the growth of their business, as POLA did here.

Third, the United States asserts that "the off-street parking and placard requirements . . . are more regulatory than commercial in character." *Id.* They are, says the United States, "provisions of general applicability" and concern "quintessential functions of government (parking restrictions and vehicle identification)." *Id.* But the off-street parking and placard provisions of the concession contract do not have "general applicability." They apply only to LMCs who

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the municipality in question and "a very different case would have been presented" if such conduct had been at issue.

have signed a contract. As for their being "quintessentially governmental," private companies frequently place placards on their trucks saying something like "How's my driving? Call 800-xxx-xxxx." *See, e.g.*, Apr. 28, 2010 Trial Tr. at 30:1-8, ECF No. 338. And businesses serving the public might understandably insist that their employees park in parking garages rather than on nearby residential streets, in order to avoid complaints or opposition from neighbors. So such objectives are not necessarily, or "quintessentially," governmental in nature.

The United States does concede that the two provisions were designed "specifically to generate goodwill among local residents and to minimize exposure to litigation from them." U.S. Br. 24 (quoting District Court opinion, Pet. App. 127a). And generation of such goodwill in order to facilitate Port expansion is at the heart of the reason why POLA's concession contract is commercial in nature.

The United States nevertheless seeks to defend its position by stating that "a government entity could claim such an interest for even the most thinly veiled regulatory action." U.S. Br. 24. But the possibility that, on other facts, a government entity "could" use such a claim to try and justify regulation is, we submit, not pertinent. What is pertinent is POLA's actual objective in seeking to create community goodwill, and the factual findings below are clear that that objective was to avoid litigation which would undermine the Port's commercial objectives. Furthermore, the Court of Appeals expressly precluded

the supposed "sham" problem mentioned by the United States by holding that the employee driver provision of the contract did not fall within the market-participant doctrine because it was indeed "tantamount to regulation." Pet. App. 44a.

The United States' only other point on this particular topic is its statement that "a general interest in public approval does not suffice to establish that a governmental entity is acting as a market participant." U.S. Br. 24. That contention attacks a straw man, however. POLA has never contended that a "general interest in public approval" made the concession program proprietary, nor did the courts below so hold. Again, the key point here is that POLA undertook the concession contract not to obtain "general approval," but in direct response to litigation and community opposition that had hindered some of its key business objectives.

The fourth and final "consideration" pointed to by the United States is that "the Port does not itself contract with drayage-service providers (apart from the concession agreement itself)." *Id.* The United States concedes that "[s]tanding alone, that fact might not preclude a market-participant finding. It is conceivable that a government entity managing access to its property may act as a market participant even if it does not directly participate in the market it seeks to affect." *Id.* In this respect it cites (as it must) *White,* 460 U.S. at 211 n.7, which concludes that market participation does not "stop at the boundary of formal privity of contract." But the United

States nonetheless asserts that a "more attenuated relationship between the government entity and the motor carrier calls for a *substantial* commercial justification" in order for the entity's actions to fall within the market-participant doctrine. U.S. Br. 25 (emphasis added). No persuasive basis, nor any citation to a decision utilizing such a standard, is provided for the assertion that in such circumstances a more "substantial" business justification is necessary.

The courts below have carefully examined the facts here and have concluded that without question there was indeed a business justification – and not a weak one – for the concession contract requirements at issue, and that should be enough. Again, it is the facts here, not hypothetical facts that could exist in some other situation, that should govern application of the market-participant doctrine.

The Court may in fact fairly ask why a standard consisting of only certain selected "considerations" – some of them hypothetical and all having an unexplained provenance – is a sensible way of determining whether specific conduct by a state or local business entity falls within the market-participant doctrine. We submit that that question should be answered, as it has in every case of which we are aware, by assessing the exact conduct engaged in by the entity in question in the context of its basic motivation. Indeed, in its brief at the certiorari stage, the United States was more willing to give deference to the actual facts of this case rather than to what other state business entities "might" do.

In that brief, after noting the points included in its merits brief and addressed above, the United States conceded that "there are some considerations that might be thought to cut the other way." U.S. Cert. Br. 11. Those points are drawn principally from the record and relate to the actual conduct of POLA and the other facts of this case. First, said the United States (as we noted above):

> The Port is self-sustaining solely from revenues it receives . . . , [it is] not taxpayer-funded . . . , [and] a steady supply of drayage trucks and drivers is integral to cargo movement at the Port . . . . [Moreover, the Port's] expansion has been impeded by community opposition and costly lawsuits that the concession agreements are intended to help avert . . . .

Id. (internal citations and quotation marks omitted). Furthermore, acknowledged the United States at that time:

> [T]he mere fact that the concession agreements were prompted in part by environmental concerns does not categorically render them non-proprietary. . . . Numerous Fortune 500 companies have launched similar "green" initiatives.

Id. at 11-12.[25]

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[25] Indeed, as the representative of a group of privately-owned marine terminal operators with facilities at POLA testified below, "addressing community concerns can be a positive thing[ ] from a business perspective." Apr. 27, 2010 Trial Tr. at 157:22-25, ECF No. 337.

We submit that those points, made by the United States at the certiorari stage but not emphasized in its merits brief – together with the analysis set out above – call for affirmance of the Court of Appeals' conclusion that the off-street parking and placard provisions of the Port's concession contract fall within the market-participant doctrine.

The District Court found that the "Port's adoption of the Concession Agreement as a whole is an 'essentially proprietary' action under the market-participant doctrine, because the Port took the action in order to sustain and promote Port operations." Pet. App. 120a. It also found that "through the Concession Agreement, POLA aims to secure the provision of responsible motor carrier services that are necessary for the maintenance and growth of its commercial operations." *Id.* More specifically, the court found that "both the off-street parking and placard provisions were designed specifically to generate goodwill among local residents and to minimize exposure to litigation from them . . . ." *Id.* at 127a. Those findings, which were not challenged by ATA, form the core of the basis for applying the market-participant decision here, as the Court of Appeals correctly held below.

II. *CASTLE* DOES NOT BAR SAFETY-BASED RESTRICTIONS ON LMC ACCESS TO PRIVATE PORT PROPERTY

In its 1954 *Castle* decision, this Court held that, under the Motor Carrier Act of 1935, the

state of Illinois could not punish a motor carrier for violations of state safety standards by suspending the motor carrier's right to use state highways, because such a suspension was "the equivalent of a partial suspension of [the carrier's] federally granted certificate [of public convenience and necessity.]" 348 U.S. at 64.

The District Court and the Court of Appeals here correctly found that *Castle* does not bar the Port from permitting access only to motor carriers that comply with the safety restrictions set forth in the concession contract. Pet. App. 30a-32a. As the Court of Appeals observed: "*Castle* does not . . . stand for the proposition that the States have no power to limit motor carrier access to particular land in order to further safety." *Id.* at 31a. In particular, denial of access to the Port "does not rise to the level of the comprehensive ban at issue in *Castle*." *Id.* at 32a. As the court explained, "[u]nlike a ban on using all of a State's freeways, a limitation on access to a single Port does not prohibit motor carriers from participating in 'transport [of] interstate goods to and from that State' or eliminate 'connecting links to points in other states.'" *Id.* (quoting *Castle*).

We submit that the majority's reasoning with respect to *Castle* is correct and should be affirmed. *See Bradley v. Public Utils. Comm'n*, 289 U.S. 92, 94 (1933) (state's denial of certificate of public convenience and necessity to motor carrier to operate on one state highway extending from Cleveland to the Ohio-Michigan border, with Michigan as the final

destination, did not exclude the motor carrier from operating interstate, but merely from that particular route). *Bradley* was decided under a negative Commerce Clause analysis analogous to the preemption assessment applicable in today's deregulated trucking context.

Quite apart from the Ninth Circuit's rationale, however, ATA's argument based on *Castle* and related cases fails for multiple reasons.

A. ATA's *Castle* Argument Pertains Only to the Concession Contract's Safety-Related Provisions and So Applied Has Unsupportable Consequences

Not surprisingly inasmuch as *Castle* concerned a state's safety restrictions, ATA framed its *Castle* argument below as a challenge to the Port's authority to suspend or revoke motor carrier access to Port property for safety-related violations of a concession contract. *See* Brief of Appellant ATA at 56-61, No. 10-56465 (9th Cir. Dec. 29, 2010), ECF No. 13 (discussing *Castle* under the headings "POLA Cannot Revoke Drayage Carriers' Interstate Authority on Safety Grounds" and "Reform of Motor Carrier Regulation Did Not Extinguish Exclusive Federal Control Over Safety-Related Suspension Or Revocation Of Interstate Operating Authority").

Accordingly, both the majority and the dissent below addressed *Castle* in the course of analyzing whether the District Court correctly applied the

safety exception contained in section 14501(c)(2)(A). The majority's opinion discusses *Castle* in a section headed, "Safety Exception," Pet. App. 30a, characterizing the issue as "whether the district court identified the correct legal principles in applying the safety exception to [FAAAA] preemption." *Id.* The dissent also headed its discussion of *Castle* "Safety Exception," *id.* at 52a, and concluded that "the Port cannot justify any of the challenged regulations on the basis of safety." *Id.* at 56a.

Thus, even if ATA's *Castle* argument were persuasive – and it is not – it would have ramifications only as to (a) the concession contract's maintenance provision, which the Court of Appeals and District Court found to be "genuinely responsive to safety" concerns and thus to fall within the express safety exception of section 14501(c)(2)(A), and (b) perhaps the placard provision.[26] Pet. App. 33a-38a, 45a.

Consideration of ATA's *Castle* argument with respect to the maintenance requirement illustrates the fallacy of ATA's position. ATA contends that *Castle* represents an independent limitation on state

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[26] As discussed earlier, although the placard provision was held to fall within the safety exception contained in section 14501(c)(2)(A), it was also analyzed under section 14506, which does not contain a safety exception. *See* p. 10 n.9, *supra*. The Court of Appeals found that the placard provision is not preempted by section 14506 because that provision was adopted to address specific proprietary concerns at the Port, thus bringing it within the market-participant doctrine. Pet. App. 45a-46a.

authority precluding the Port from "enforcing *even otherwise-nonpreempted* regulations on motor carriers by suspending or revoking their access to the Port," Pet. Br. 35 (heading capitalization omitted; emphasis added). Thus, in ATA's view, even if it is undisputed that the maintenance requirement is not preempted by the FAAAA because it falls within that statute's express safety exception, that requirement may still be invalidated under *Castle*.

ATA's position evidently rests on the premise that the Court's 1954 decision in *Castle* somehow overrules the express safety exception adopted by Congress as part of the FAAAA in 1994. Such an illogical result would render the safety exception of section 14501(c)(2)(A) meaningless, contrary to basic interpretive canons. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant"). As a practical matter, moreover, ATA's argument would provide plaintiffs such as ATA with two bites at the apple on preemption claims under the FAAAA (since state safety provisions not preempted by the FAAAA could be challenged under *Castle*). This is not and cannot be the law. *See, e.g., City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 439, 442 (2002) (holding that the FAAAA's safety exception permits states to take motor carrier-related actions that are genuinely responsive to safety concerns, without once addressing whether *Castle* relates in any way to that issue). *See also* U.S. Br. 33 ("*Castle*

does not provide an independent basis to challenge the substance of [the concession] requirements").

B. *Castle* and the *City of Chicago* Cases Relied on by ATA Are No Longer Governing Law as to Issues Such as Those Involved in this Case

Regardless of whether it is read to relate only to safety or more broadly, ATA's *Castle* argument also fails because *Castle* is not good law today with respect to the concession contract requirements, as the District Court recognized. *See* Pet. App. 128a-29a, 156a-58a.[27] *Castle* was decided in the context of a defunct regime of comprehensive federal regulation of interstate trucking. As the brief of the United States describes in detail, the regulatory system addressed by *Castle*, the Motor Carrier Act of 1935, was terminated between the 1970s and 1990s through multiple trucking deregulation statutes, including the FAAAA. U.S. Br. 1-7. Because the regulatory regime that was addressed in *Castle* has been superseded, that decision does not govern any issue in this case.

The Motor Carrier Act granted the Interstate Commerce Commission ("ICC") broad authority to regulate interstate motor carriers' rates, routes, and services. Motor Carrier Act, ch. 498, §§ 204, 216-18, 49 Stat. 543, 546, 558-63 (1935). In particular, it prohibited commercial motor carriers from engaging

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[27] The Court of Appeals expressed no opinion on this point. *See* Pet. App. 32a.

in interstate or foreign transportation unless they first obtained a "certificate of public convenience and necessity" from the ICC. Ch. 498, § 206(a), 49 Stat. at 551; *see McDonald v. Thompson*, 305 U.S. 263, 265 (1938). The ICC was authorized to issue a certificate only if it found that "the proposed service . . . is or will be required by the present or future public convenience and necessity . . . ." Ch. 498, § 207(a), 49 Stat. at 551-52. Once issued, the certificate could be suspended or revoked only if the carrier willfully violated the terms of the certificate or federal law and only after notice and a hearing. Ch. 498, § 212(a), 49 Stat. at 555.

Since the Motor Carrier Act did not contain an express preemption clause, the Court in *Castle* applied conflict preemption principles to hold that the state of Illinois' suspension of a motor carrier's right to use state highways was impermissible as "equivalent [to] a partial suspension of [the carrier's] federally granted certificate [of public convenience and necessity]." 348 U.S. at 64. Describing the Motor Carrier Act's "comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce," the Court found that, "*[u]nder these circumstances*, it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate." *Id.* (emphasis added).

A review of the decision and the briefs in *Castle* demonstrates that the federal interests giving rise to the outcome in that case no longer exist in today's

deregulated trucking environment. As the brief of the successful party in *Castle* pointed out, the Illinois suspension provision would upset the "delicately balanced federal system" contemplated by the then-applicable regulatory regime because, as applied to the particular motor carrier involved, "it would cause a complete cessation of the [interstate] operations . . . of a significant and essential certificated common carrier upon whom many communities are solely dependent." Brief for Respondent at 3, *Castle v. Hayes*, No. 44 (Sept. 15, 1954).

The *City of Chicago* cases cited by ATA at pages 37 and 38 of its brief – *City of Chicago v. Atchison, Topeka & Santa Fe Railway Co.*, 357 U.S. 77 (1958), and *Railroad Transfer Service, Inc. v. City of Chicago*, 386 U.S. 351 (1967) – were likewise decided in the highly regulated context of federal railroad regulation. Those cases arose from Chicago's "persistent efforts" to regulate the business of Railroad Transfer Service, Inc. ("Railroad Transfer"), a motor carrier organized by interstate railroads with lines terminating at different terminals in Chicago to transport interstate railroad passengers between the city's rail terminals. *R.R. Transfer Serv.*, 386 U.S. at 352.

In *Atchison*, the Court considered a municipal ordinance adopted by Chicago in response to the railroads' creation of Railroad Transfer, providing that no license for a transfer vehicle would issue unless the City Commissioner of Licenses first determined that the public convenience and necessity

required additional interterminal service. *Atchison*, 357 U.S. at 79-80. The Court analyzed the ordinance under then-existing provisions of the Interstate Commerce Act ("ICA"), ch. 104, 24 Stat. 379 (1887), codified as amended, 49 U.S.C. § 1 *et seq.*, which the Court interpreted "not only [to] authorize the railroads to take all reasonable and proper steps for the transfer of persons and property between their connecting lines, but [to] impose affirmative obligations on them in this respect." 357 U.S. at 86. As the Court explained, the provisions "manifest[ed] a congressional policy to provide for the smooth, continuous and efficient flow of [interstate] railroad traffic . . . subject to federal regulation," and "it would be inconsistent with this policy if local authorities retained the power to decide whether the railroads or their agents could engage in the interterminal transfer of interstate passengers." *Id.* at 87.

Accordingly, the Court concluded that the city could not exercise any "veto power" over Railroad Transfer's operations. *Id.* at 85. The Court recognized, however, that while the city could not prevent Railroad Transfer from operating, it retained "considerable authority" to regulate transfer vehicles, especially with regard to safety. *Id.* at 88 ("It could hardly be denied . . . that such [transfer] vehicles must obey traffic signals, speed limits and other general safety regulations. Similarly, the City may require registration of these vehicles and exact reasonable fees for their use of the local streets").

Nearly a decade later, the Court considered amendments to the same municipal ordinance at issue in *Atchison*, adopted by Chicago in an effort to evade the Court's *Atchison* decision and to further regulate Railroad Transfer. The Court invalidated the amendments, again finding that Chicago's efforts were inconsistent with the ICA. *R.R. Transfer Serv., Inc.*, 386 U.S. at 359. In so holding, the Court continued to recognize the city's authority to regulate with respect to safety. *Id.* at 360.

Castle and the *City of Chicago* cases are far removed from the facts and law of this case. Those decisions addressed, under conflict preemption principles, state and local actions that interfered with comprehensive regimes of federal regulation in the interstate trucking and railroad contexts, respectively, that have since been dismantled. *See generally* Trucking Deregulation in the United States, Submission by the United States to the Ibero-American Competition Forum, September 2007, *available at* http://www.ftc.gov/bc/international/docs/ibero-trucking.pdf; B. Eakin and M. Meitzen, Opinion: After 30 Years, Railroad Deregulation Continues to Deliver, AOL opinion, Nov. 9, 2010, *available at* http://www.aolnews.com/2010/11/09/opinion-after-30-years-railroad-deregulation-continues-to-deli/. In particular, the ICC no longer exists. *See* ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, 932-34. Thus, no barriers to entry in the trucking industry exist today in the form of ICC-granted certificates of convenience and necessity. Although, as the dissent below notes,

the Department of Transportation continues to issue interstate transportation "registrations" or "permits" to trucking companies, Pet. App. 53a, the Secretary is required to grant registration to any applicant "willing and able to comply" with relevant federal statutes and regulations. *See* 49 U.S.C. § 13902(a)(1).

Because there is no functional equivalent in today's deregulated trucking regime to the certificates of convenience and necessity formerly issued by the ICC, *Castle*'s holding that Illinois' suspension of a motor carrier's right to use state highways was tantamount to "a partial suspension of [the carrier's] federally granted certificate [of public convenience and necessity]," 348 U.S. at 64, has no relevance to this case. Indeed, since the passage of the ICC Termination Act in 1995, not a single federal court – apart from the courts below in this case – has analyzed the applicability of *Castle* on any set of facts.[28] In short, *Castle* (and the *City of Chicago* cases) have little if any vitality today.[29]

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[28] One state court decision, *Bronco Wine Co. v. Jolly*, 33 Cal. 4th 943, 995 (Cal. 2004), *cert. denied*, 544 U.S. 922 (2005), cited to *Castle* (without analyzing the decision).

[29] ATA cites *Kurns v. Railroad Friction Products Corp.*, 132 S. Ct. 1261 (2012), in support of its argument that because Congress has preserved the federal government's authority to issue "interstate transportation permits," the Court's decision in *Castle* remains intact. *Kurns* is inapposite. In that case, the Court rejected an argument that the Locomotive Inspection Act, 49 U.S.C. § 20701 *et seq.*, had been superseded by the Federal Railroad Safety Act of 1970, 49 U.S.C. § 20102 *et seq.* ("FRSA").

(Continued on following page)

C. Denial of Access to Private, Restricted Access Land at POLA Does Not Implicate *Castle*

Even if *Castle* were held to apply in this case, the limited holding of that decision would not extend to preclude the Port from denying access to private Port property. As described above, *Castle* involved state action barring a motor carrier's access to "state roads" in the context of expansive federal regulatory regimes. 348 U.S. at 62. *See also id.* at 64 (access to "Illinois highways" at issue).[30] The decision did not address state action, taken in a commercial and proprietary capacity, relating not to public highways but to state-owned property used as the site of a state-operated commercial enterprise.

As the District Court found, "[T]he [concession] agreement merely addresses the ability of drayage trucks to enter *the Port's own private property* for business purposes, not to drive generally on public highways." Pet. App. 135a-36a (emphasis added). As demonstrated by the District Court's finding, ATA has not met its burden of showing that suspension or revocation of a motor carrier's concession contract by

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132 S. Ct. at 1267. As the Court explained, the FRSA supplemented existing railroad safety laws, and "[b]y its terms . . . does not alter pre-existing federal statutes on railroad safety." *Id.* As discussed above, through various trucking deregulation statutes, Congress has dismantled the federally regulated trucking regime at issue in *Castle*.

[30] *See also Atchison*, 357 U.S. at 88 ("use of local streets").

POLA would result in exclusion of the carrier from any state highway or public road, contrary to *Castle*.

In particular, ATA has failed to show that beyond the terminal gates – where a truck that is barred from accessing Port property would be turned away (*see* Tariff No. 4, JA105) – drayage trucks would be excluded from any state highways, public roads, or land otherwise open to the public. And the record indicates that ATA could not make such a showing. *See* Trial Demonstrative Ex. 2, Map of Los Angeles and Long Beach Harbors, JA back cover (indicating that local streets end some distance from wharves). *See also* Apr. 28, 2010 Trial Tr. at 77:14-20, 104:1-9, 108:7-9 (expert testimony regarding restrictions on truck access to marine terminals). On this basis alone, *Castle* is inapplicable.

Restrictions on access to state-owned private property present special circumstances not addressed by *Castle*. By analogy, suppose that in *Reeves*, in response to safety concerns South Dakota had erected a fence around the state-owned property in the middle of which its cement plant and an adjacent loading dock were located. Suppose further that only trucks that met certain state safety requirements were allowed to enter the state-owned property, proceed over the fenced-off macadam surrounding the plant, and pick up cement from the loading dock. Under ATA's view of *Castle*, such access restrictions would be prohibited. But as the courts below correctly recognized, *Castle* does not go this far. Indeed, the United States specifically agrees with this *Reeves*-based analysis in

its discussion of the market-participant doctrine. U.S. Br. 21.

Finally, even in the context of the then-existing comprehensive federal regulatory regimes governing trucking and railroads, *Castle* and the *City of Chicago* cases recognized that states retained "considerable authority" to condition access to state highways and city roads on compliance with safety requirements. *See Castle*, 348 U.S. at 64 (recognizing states' right to regulate the size and weight of motor vehicles under the Motor Carrier Act); *Atchison*, 357 U.S. at 88 (recognizing Chicago's authority to regulate transfer vehicles with regard to safety, including the authority to impose registration requirements and to exact reasonable fees for use of local streets); *R.R. Transfer Serv., Inc.*, 386 U.S. at 360 (same). Indeed, as the United States observes, "Nothing in *Castle* . . . supports the view that a State is required to allow unsafe vehicles to use its highways or gain access to its other transportation infrastructure." U.S. Br. 29-31.

D. Remand is Not Warranted to Determine Whether the Port Intends to Punish Past, Cured Infractions of the Concession Contracts

In its brief, the United States recommends that the *Castle* issue should be remanded for determination of whether the Port intends to punish "past, cured" breaches of the concession contract through

suspension or revocation of a motor carrier's concession agreement. U.S. Br. 32-33. This recommendation should be rejected.

ATA's complaint framed its allegations as a facial challenge to the concession contract prior to its implementation in October 2008. *See* Complaint for Declaratory Judgment & Injunctive Relief, No. 08-49420 (C.D. Cal. July 28, 2008), ECF No. 1. A facial challenge fails unless the plaintiff establishes that "no set of circumstances" exists under which the challenged provision would be valid. *See United States v. Salerno*, 481 U.S. 739, 745 (1987); *Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995). Of course, several challenged aspects of the concession contract have been upheld and are not even at issue here.

It would be premature to remand the issue identified by the United States, which relates to potential enforcement by the Port of concession contracts with respect to "past, cured" breaches of concession requirements. As the United States itself suggested in its brief at the certiorari stage, *see* U.S. Cert. Br. 22, such a claim is properly brought as an as-applied challenge by a motor carrier aggrieved by an actual revocation or suspension of its concession. Should such an as-applied challenge be brought, the Port will show that it does not "claim[ ] the authority to punish past, cured violations of the requirements challenged here through suspension or revocation," as

the United States frames the issue. But that is an issue for another day.

CONCLUSION

For the reasons stated above, the Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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RESPONDENT'S BRIEF

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Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioners,

v.

CITY OF LOS ANGELES, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

Natural Resources Defense Council, Inc., Sierra Club, and Coalition for Clean Air, Inc. join the "Restatement of Questions Presented" submitted by Respondents City of Los Angeles et al.

CORPORATE DISCLOSURE STATEMENT

Natural Resources Defense Council, Inc., Sierra Club, and Coalition for Clean Air, Inc. are nonprofit corporations which do not issue stock and which are not subsidiaries or affiliates of any publicly owned corporations.

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INTRODUCTION

Respondents Natural Resources Defense Council, Inc. ("NRDC"), Sierra Club, and Coalition for Clean Air, Inc. submit this brief to advance one point: the Port of Los Angeles' (the "Port") concession agreement falls within the market participant exception to the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. § 14501 *et seq*.

The undisputed facts show that the Port adopted its Clean Truck Program – of which the concession agreement is a critical component – in response to community and environmental challenges that threatened the Port's vitality as a commercial enterprise. Further, while the Port's challenges were extraordinary, its response was not; private companies in analogous situations would take and have taken similar actions. For these reasons, and those provided by Respondents City of Los Angeles et al. (the "City" or "City of Los Angeles"), the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

STATEMENT

Corporate America looks different today than it did 30 years ago. Today, a company's customers, insurers, shareholders, and risk consultants ask about a company's "environmental footprint" domestically and abroad. Consumers care about corporate

sustainability initiatives and are willing to pay a premium for products that are made, shipped, and sold in a way that protects the environment. Every boardroom has at least one executive who is charged with "greening" the company's operations. And leading business journals fill their pages with talk of "conscious capitalism."

The environment matters. It's not just on the minds of treehuggers and altruistic businessmen. It matters to every CEO who works to manage risk, protect a corporate brand, and remain competitive. It matters to a company's survival.

For the Port, the link between protecting the environment and remaining competitive became clear in 2001 when the Port was enjoined from completing a lucrative terminal expansion project. The injunction issued after a state appellate court held that the Port had violated environmental laws by failing to analyze how its expansion plans would pollute the air and threaten the health and well-being of local communities. In 2008, harbor-area communities suffered an average cancer risk from air pollution that was more than 60 percent higher than the average in the region. Air pollution from port-serving trucks is a major contributor to this problem. For the *seven years* following 2001, community opposition to the Port's polluting operations continued, effectively forestalling all major infrastructure development at the Port at a time when cargo shipments from Asia – the Port's primary customer base – were steadily increasing.

The Port then responded, as any business owner would, to relieve the chokehold on its development. The Port adopted a new "green" business model to manage risk, build community goodwill, and, on the most fundamental bottom-line level, to grow. We discuss these facts below, and join the Statement provided by the City of Los Angeles.

A. Port Operations Generate Significant Air Pollution And Threaten The Well-Being Of Local Communities

The Port is an independent, self-funding department of the City of Los Angeles. Pet. App. 68a.[1] It is the leading container port in the United States in terms of shipping container volume. Pet. App. 69a. In 2008, the Port handled more than $240 billion in cargo. *Id.*

The Port operates as a landlord; it develops terminal facilities and then leases those facilities to shipping lines and stevedoring companies. Pet. App. 71a. It is located along 43 miles of the coast of San Pedro Bay, approximately 20 miles south of downtown Los Angeles and adjacent to the Port of Long Beach. Pet. App. 69a. Several residential areas adjoin the Port, including the neighborhoods of San Pedro and Wilmington. *Id.* Over two million people reside in

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[1] "Pet. App. XX" refers to the appendix attached to Petitioner American Trucking Associations, Inc.'s ("ATA") Petition for a Writ of Certiorari.

these and other communities surrounding the two ports. *Id.*

Approximately 16,000 trucks driven by thousands of drivers serve the Port. Pet. App. 8a; JA118.[2] These "drayage" trucks haul cargo between the Port and off-port rail yards, warehouses, and businesses, and are integral to the Port's operations. *See* Pet. App. 71a-72a. The Port's revenue is directly tied to the volume of containers moved through the terminals. Pet. App. 72a. The greater the volume of containers handled at the Port, the greater are the Port's revenues. *Id.* Hence, the Port has a direct financial interest in the unhindered and efficient flow of cargo through its terminals and in increasing container traffic through the Port terminals. *Id.* If the drayage system breaks down, cargo will back up at the Port, shippers will go elsewhere, and the Port will lose money and market share.

The Port expects its cargo volumes to at least double the demand for cargo-handling capacity over the next decade. *Id.* The Port faces competition from other U.S. ports, including its neighbor, the Port of Long Beach, and foreign ports in Mexico and Canada. Pet. App. 73a, 78a. The Port also faces additional competition because of the upcoming expansion of the Panama Canal, which will provide a new direct shipping route from Asia to East Coast ports.

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[2] "JAXXX" refers to the Joint Appendix submitted with ATA's Brief for Petitioner.

Pet. App. 73a.[3] As a result, the Port needs to continually upgrade and renovate its facility and improve the efficiency of cargo operations to maintain its competitive position and capture additional business. *Id.*

The Port is located in California's South Coast Air Basin (the "Basin"), which is in violation of federal air quality standards for ozone and fine particulate matter. Pet. App. 73a-74a. In 2008, the Basin had the worst air quality in the nation for these pollutants. Pet. App. 74a. Emissions data from 2002 indicates that activities at the Ports of Los Angeles and Long Beach greatly contributed to the Basin's air pollution problem – producing, for example, almost one-quarter of the total diesel particulate matter emitted in the Basin. *Id.* In 2008, the South Coast Air Quality Management District ("SCAQMD") discovered that communities around the Port suffered an average cancer risk from air pollution that was more than 60 percent higher than the average in the Basin. *Id.*

Air pollution from drayage trucks greatly contributes to this problem. Pet. App. 75a. Drayage

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[3] *See also* Brad Racino, *Canal expansion sets up battle of the ports*, NBCNews.com, http://www.nbcnews.com/business/canal-expansion-sets-battle-ports-877649 (last visited March 13, 2013) (discussing the intense competition between west coast ports and east coast and gulf ports in light of the Panama Canal expansion). Completion of the canal expansion is now expected in 2015. *See id.*

trucks serving the Port have historically tended to be older and more polluting than those used by national long-haul truck fleets. *Id.* Drayage trucks typically start out as long-haul trucks, that are later sold to smaller, lower-cost carriers who use them to the end of their useful long-haul lives before selling the trucks to drayage carriers for Port use. *Id.* Prior to the implementation of the Clean Truck Program, drayage trucks accounted for between 10 and 24 percent of the total emissions of diesel particulate matter and nitrogen-oxides from all Port sources. *Id.*

In addition, the practice of drayage trucks parking in neighborhoods near the Port has contributed to heavy truck traffic in residential areas, resulting in increased safety and security risks for local communities, and noise. Pet. App. 40a-41a; Trial Ex. 185 at LAD001213;[4] Trial Tr. at 79:3-23 (Apr. 28, 2010), ECF No. 338, filed Jan. 14, 2011.[5] Trucks account for a disproportionate amount of the accidents, traffic violations, and citations for improper vehicle maintenance in the harbor area. Pet. App. 88a.

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[4] "Trial Ex. XX" refers to the trial exhibits admitted during the District Court trial in this case (*Am. Trucking Ass'ns v. City of Los Angeles, et al.*, Case No. 08-4920-CAS, 2010 WL 3386436 (C.D. Cal. Aug. 26, 2010)).

[5] "Trial Tr. at XX:XX" refers to the transcript of trial proceedings before the District Court (*Am. Trucking Ass'ns v. City of Los Angeles, et al.*, Case No. 08-4920-CAS, 2010 WL 3386436 (C.D. Cal. Aug. 26, 2010)).

Further, there are risks of hazardous materials discharging from leaking containers, container theft, stolen trucks, and the risk that someone can take over a truck, or even use the vehicle as a weapon. Trial Tr. at 67:6-19, 69:15-25 (Apr. 23, 2010), ECF No. 336, filed Jan. 14, 2011. The Port has identified trucks being driven in and out of the Port by unknown and unidentified drivers as a key security vulnerability. Pet. App. 94a. In one instance, the Port learned that a particular driver's license number was reported 46 times through a terminal gate in a single day, representing 23 trips to and from the Port. Pet. App. 94a-95a. The Port estimated that this number was about five times the number of trips that a single driver could perform on a typical day, and that several drivers had likely used the same false identification. Pet. App. 95a. There have also been reported incidences of drivers carrying unauthorized passengers into Port terminals. JA119. These facts are particularly concerning because the Port has been identified by the Department of Homeland Security as one of seven port areas considered to be "Group I" port areas at the highest risk of terrorist attack. Pet. App. 93a.

B. Environmental And Community Groups Stymie All Major Port Expansion Projects For Seven Years

As a result of the health risks caused by Port operations, environmental and community groups mobilized to oppose Port expansion projects and

blocked a series of projects from 2001 to 2008. Pet. App. 75a.

In 2001, NRDC and three other environmental and community groups filed a lawsuit in state court against the Port alleging that it had violated the California Environmental Quality Act ("CEQA") with respect to an agreement it entered with the China Shipping Line Company for the construction and lease of a new container terminal facility at the Port. Pet. App. 76a; *Natural Res. Def. Council, et al. v. City of Los Angeles, et al.*, 103 Cal. App. 4th 268 (2002). In 2002, the California Second District Court of Appeal ruled in favor of NRDC et al. and enjoined further construction at the terminal. *Id.* The following year, the Port and NRDC et al. reached a settlement that enabled the Port to proceed with the China Shipping expansion project subject to a number of mitigation measures. Pet. App. 76a. The settlement required the Port to establish a fund for mitigation of air quality and aesthetic impacts in the community due to the new terminal. Pet. App. 76a-77a. The Port also committed to extensive equipment modifications in the terminal as well as requiring ships to turn off their engines and switch to shore-side electrical power when docked, a process called "cold ironing." Pet. App. 77a. The settlement cost the Port more than $80 million. *Id.* Funds for the settlement came entirely from Port revenue, without contributions from either the City of Los Angeles or China Shipping. *Id.*

After the China Shipping settlement, the Port continued to face pressure from the surrounding community and environmental groups such as NRDC in connection with proposed development projects that were anticipated to result in more air pollution. *Id.* For example, in 2007, NRDC opposed the Port's proposal to expand the "TraPac" terminal to 243 acres from 176, to add on-dock rail facilities, and to reconfigure area roadways to better accommodate additional traffic. *Id.* NRDC filed an appeal with the Los Angeles City Council seeking to reverse the Port's approval of the project and indicated a willingness to initiate a lawsuit to prevent the expansion. Pet. App. 78a. The Port considered the TraPac expansion project critical because TraPac's customers, Asian shipping lines, had begun using a new generation of larger container ships which could not be accommodated at TraPac's facilities as configured. *Id.* In the summer of 2007, three Asian shipping lines that regularly sent approximately 12,000 cargo containers per month through the TraPac terminal announced plans to take their business to the Port of Long Beach. *Id.* This decision represented a significant revenue loss for both TraPac and the Port. *Id.* Ultimately, litigation over the TraPac expansion project was averted through an agreement that permitted the project to proceed on the condition that the Port fund a study of off-port impacts on health and land use in the communities of San Pedro and Wilmington, and establish a five-year mitigation fund valued at over $12 million to offset the environmental impact of the expansion. *Id.*

C. The Port Adopts A "Green Growth" Strategy To Remain Competitive

At trial, then-President of the Port's Board of Harbor Commissioners ("BHC"), S. David Freeman,[6] testified that when he was appointed to the BHC in 2005, his "management objectives" were to:

> [D]eal with the twin problems of growth and pollution. And we quickly realized that in order to grow the port, we had to abate the pollution because the people in San Pedro and Wilmington were not only angry and not only suffering from terrible air pollution, but they had learned that the law was there to protect them, and the NRDC and others had filed lawsuits, and they had stopped the port from growing. So green growth which is what we called it was an absolute business necessity for us to grow. . . . [T]he concerns we had [were] how we were going to continue to be Number 1 and have the jobs that came with that when we had a situation where the consumers nearby were, in effect, subsidizing the goods movements with their lungs, and

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[6] Mr. Freeman served as President of the Port Board of Harbor Commissioners from September 2005 until May 2009. Trial Tr. at 36:24-37:4 (Apr. 27, 2010), ECF No. 337, filed Jan. 14, 2011. Mr. Freeman's prior work experience includes running the Tennessee Valley Authority, Lower Colorado River Authority, New York Power Authority, Los Angeles Department of Water and Power, and Sacramento Municipal Utility District. *Id.* at 38:1-16.

> everybody knew it, and they had legal power to stop us from going forward. . . .

Trial Tr. at 46:11-20, 47:22-48:2 (Apr. 27, 2010), ECF No. 337, filed Jan. 14, 2011; *see also* Pet. App. 122a (quoting Mr. Freeman's trial testimony).

Consistent with these objectives, and in response to the environmental concerns that had halted Port expansion projects, the Port, jointly with the Port of Long Beach,[7] adopted a Clean Air Action Plan ("CAAP") in November 2006. Pet. App. 79a. The CAAP states:

> The Ports recognize that their ability to accommodate the projected growth in trade will depend upon their ability to address adverse environmental impacts (and, in particular, air quality impacts) that result from such trade. The [CAAP] is designed to develop mitigation measures and incentive programs necessary to reduce health risks while allowing port development to continue.

Id. The CAAP identified trucks as a significant source of air pollution and called for the rapid replacement or retrofitting of the entire 16,000 drayage truck fleet serving the Port within a five-year period. Pet. App. 80a.

From November 2006 through February 2008, the two ports worked together to develop the Clean

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[7] The Port of Long Beach was also a defendant in this case until it settled with ATA in 2009. Pet. App. 61a n.2.

Truck Program, and held numerous meetings and workshops to gather different ideas for possible implementation. *Id.* Ultimately, the Clean Truck Program embodied several components: a progressive ban on older, more polluting trucks; a fee charged on older trucks that enter the Port; grants and subsidies funded by the Port to encourage motor carriers to replace or retrofit their older trucks; and a concession agreement that created a direct contractual relationship between the Port and motor carriers performing drayage services. Pet. App. 83a-84a. The concession agreement contains the parking and placard provisions that are at issue before this Court. The parking provision states:

> Concessionaire shall submit for approval by the Concession Administrator, an off-street parking plan that includes off-street parking location(s) for all Permitted Trucks. Concessionaire shall ensure that all Permitted trucks are in compliance with on-street parking restrictions by local municipalities. Permitted Trucks not in service shall be staged off public streets and away from residential districts. . . .

JA49.[8] The placard provision states:

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[8] The same provision of the concession agreement that includes the challenged "parking" requirements also requires concessionaires to ensure that their trucks comply with state and local truck routes. JA49. The "routing" requirements of the concession agreement, however, are not before this Court.

> When entering and leaving Port Property and while on Port Property, Concessionaire shall post placards on all Permitted Trucks referring members of the public to a phone number to report concerns regarding truck emissions, safety and compliance to the Concession Administrator and/or authorities.

JA51-52.

The Port determined that requiring drayage trucks serving the Port to register under a concession agreement would best serve the Port's proprietary objectives, including cleaner air, and enhanced safety and security. Pet. App. 85a. The Port also determined that the parking and placard provisions would garner community goodwill and reduce safety and security hazards caused by trucks in nearby neighborhoods. Pet. App. 87a-89a; Trial Tr. at 108:6-109:4 (Apr. 23, 2010), ECF No. 336, filed Jan. 14, 2011; Tr. Ex. 224 at LA000319. In connection with its decision to move forward with a concession agreement, the Port reiterated that a failure to significantly reduce the health and traffic impacts of Port operations on the millions of residents in neighboring communities would impede the Port's ability to handle increased volumes of trade in the future. Pet. App. 86a.

The Port made a substantial financial investment in its Clean Truck Program. At the time of the District Court trial in August 2010, the Port had spent nearly $60 million to incentivize, subsidize, and purchase cleaner trucks for concessionaires. Pet. App. 90a-92a. This amounts to the Port funding approximately

35 percent of the drayage fleet that served the Port in 2010. Pet. App. 91a.

After a seven day trial, which included a tour of the Port and testimony from 17 witnesses, the District Court rendered 105 findings of fact (many of which are detailed above) and concluded the concession agreement was a "business necessity." Pet. App. 122a. These facts were never challenged by ATA, and are the basis of the Court of Appeals' decision. *See* Pet. App. 5a-13a.[9]

D. Opposition To Port Generated Air Pollution Continues Today

Despite progress at the Port to reduce air pollution, opposition to Port growth absent meaningful mitigation for local communities remains strong. On March 7, 2013, the Port approved a $500 million rail yard project that will be sited on 153-acres of Port-owned land four miles from the harbor and in close proximity to schools, parks, transitional housing for homeless veterans, and residential neighborhoods.[10]

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[9] The District Court's findings may not be reversed absent a finding of "clear error." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-76 (1985).

[10] Dan Weikel, *L.A. harbor commissioners OK rail yard near port*, LOS ANGELES TIMES, March 7, 2013, *available at* http://www.latimes.com/news/local/la-me-gateway-20130308,0,3292721.story; *see also* Sean Belk, *Opposition Builds Over Port of L.A.'s Rail Yard Analysis*, LONG BEACH BUSINESS JOURNAL, Jan. 31, 2012, *available at* http://lbbusinessjournal.com/long-beach-business-journal-photos-in-the-news/83-january-31st/326–opposition-

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These neighborhoods are primarily low-income and working-class, and are considered part of the "diesel death zone" because of port-related air pollution.[11] The facility will handle up to 2.8 million 20-foot shipping containers a year by 2035, and will be visited by up to 8,200 trucks a day.[12]

The project aims to increase Port cargo capacity and efficiency by enhancing rail operations, but has pitted environmental groups, community residents, the Mayor of Long Beach, the Long Beach Unified School District, and air quality regulators against the Port.[13] Project opponents believe the rail yard will exacerbate already unacceptable levels of air pollution for local communities that have disproportionately high rates of asthma and respiratory illness related to emissions from port operations, especially among children.[14] The controversy over this rail yard project represents the business challenge the Port faces due to the health risks its operations impose on local communities. It also illustrates how any attempt by the Port to retreat from its green growth strategy would severely threaten the vitality of its operations.

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builds-over-port-of-las-rail-yard-analysis-long-beach-city-officials-school-district-others-say-eir-on-bnsf-project-flawed.html.

[11] Weikel, *supra* note 10.

[12] *Id.*

[13] *Id.*; Belk, *supra* note 10.

[14] Weikel, *supra* note 10.

SUMMARY OF ARGUMENT

The undisputed facts show that the Port adopted the concession agreement, which includes the two provisions challenged by ATA, as a business necessity. As such, the concession agreement is protected by the market participant exception.

Based on the scope of the City of Los Angeles' brief and the arguments contained therein, we start from the proposition that the market participant exception exists under the FAAAA's preemption provisions that relate to drayage trucking. Application of that exception poses a single inquiry: whether the challenged action constitutes direct government participation in the market. Whether private businesses engage in analogous conduct is relevant to that inquiry.

The concession agreement was adopted in response to costly environmental litigation and ongoing community opposition that thwarted Port growth for nearly a decade. Today – as was the case when the Port adopted its concession agreement – private businesses are pursuing sustainability initiatives with a sense of urgency in order to manage similar risks and remain competitive. This includes obtaining a "social license to operate" to minimize opposition to local projects, and reducing a company's environmental footprint throughout its extended supply chain. These actions affirm that the Port's adoption of the concession agreement was entirely appropriate and, moreover, typical.

The fact that the government can pursue environmental and public health objectives as a market participant was confirmed by this Court and the Courts of Appeals in cases decided starting well over three decades ago. Further, the holdings of this Court do not suggest – let alone require – that the market participant exception be interpreted to solely apply to instances of government procurement or where the "relevant market" has been narrowly defined, as ATA advocates. For these reasons, the judgment of the Court of Appeals should be affirmed.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE MARKET PARTICIPANT DOCTRINE TO UPHOLD THE PARKING AND PLACARD PROVISIONS

The market participant doctrine distinguishes between the State's role as a regulator and as a market participant. *See Reeves v. Stake*, 447 U.S. 429, 436-37 (1980).[15] Application of the market participant doctrine requires "a single inquiry: whether the

[15] The City of Los Angeles' brief details why a market participant exception exists under FAAAA sections 14501(c) and 14506(a), and explains why the concession agreement's provisions fall within that exception. We do not repeat that discussion here. Instead, NRDC joins the City of Los Angeles' arguments and makes additional arguments as to why the exception applies.

challenged program constitute[s] direct state participation in the market." *Reeves*, 447 U.S. at 435 n.7 (internal quotation omitted); Pet. App. 21a. This inquiry includes consideration of whether private actors in the marketplace engage in activities comparable to the challenged action. *Bldg. & Constr. Trades Council v. Assoc. Builders & Contractors* ("*Boston Harbor*"), 507 U.S. 218, 231-32 (1993) ("In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction."); Pet. App. 29a.

Below we describe how private companies are increasingly implementing environmentally-friendly sustainability initiatives to reduce risk and remain competitive. We outline how the Court of Appeals' decision follows leading market participant cases that have protected environmental programs under the market participant exception. And we submit that, considering the conduct of corporate America today, this Court should not define the market participant exception so narrowly that the Port is precluded from placing requirements on the Port's "interrelated service of drayage trucking." Pet. App. 27a.

A. To Remain Competitive, Private Companies Are Increasingly Responding To The Environmental Challenges Created By Their Operations

Whether you are convinced or skeptical of the merits of sustainability,[16] a paradigm shift addressing the financial impacts of resource scarcity, population growth, carbon intensity, ecosystem services and potential climate change is underway. This momentum has proven neither fragile nor fleeting, with fully 75 percent of large businesses maintaining or increasing their investments in sustainability despite a severe economic downturn and an ever-broader swath of markets regulating greenhouse gas emissions and providing incentives for corporate greening. Aligning strategies, business practices,

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[16] Many businesses define "sustainability" as the concept of the "triple bottom line – pursuing performance in economic, social, and environmental spheres." Deloitte, Sustainability in business today: A cross-industry view 3 (2010), *available at* http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/IMOs/Corporate%20Responsibility%20and%20Sustainability/us_es_sustainability_exec_survey_060110.pdf. Most companies' sustainability programs primarily include investments in environmental initiatives. *Id.* Corporate sustainability programs also derive their roots from the concept of "sustainable development," which has been defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." *Id.* at 7 (citing United Nations, Report of the World Commission on Environment and Development: Our Common Future, ch. 2, ¶ 1 (1987), *available at* http://conspect.nl/pdf/Our_Common_Future-Brundtland_Report_1987.pdf) (often referred to as the Brundtland Report)).

> systems and public image has emerged as a business necessity. Proactively embracing sustainability and carbon management is no longer a philosophical or political debate. It is a strategic decision.

– Deloitte University Press, *A Profitable Shade of Green*[17]

Multinational firms faced with negative press about their environmental record used to be able to plead ignorance and suffer few adverse consequences.[18] Those days are over. Today, images of polluting power plants and toxic oil spills stream live on our smart phones and computer screens, and are shared around the globe in seconds – setting off a firestorm of Twitter feeds, instant messages, and blogs.[19] Companies that do not successfully manage their social and environmental footprint – that is, insist on an acute awareness of potential environmental or social breaches deep in their supply chain – risk losing their corporate reputation with a few clicks of a mouse.[20]

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[17] Deloitte University Press, A Profitable Shade of Green (July 1, 2010), http://dupress.com/articles/a-profitable-shade-of-green-compounding-the-benefits-of-sustainability/?top=6 (last visited March 13, 2013).

[18] Deloitte University Press, Sustainability 2011 (Jan. 1, 2012), http://dupress.com/articles/sustainability-2011-a-difficult-coming-of-age/?top=6 (last visited March 13, 2013).

[19] *See id.*

[20] *Id.*; Knut Haanses et al., *Establishing a License to Operate*, bcg.perspectives, Nov. 15, 2011, https://www.bcgperspectives.com/content/articles/sustainability_energy_environment_establishing_license_to_operate/ (last visited March 13, 2013).

Accordingly, sustainability initiatives are about managing risk in addition to reducing operational cost and enhancing competitiveness.[21]

In 2010, MIT Sloan Management Review reported that 88 percent of business executives believe that "sustainability-driven strategies will be necessary to be competitive – if not right now, then soon."[22] Consider the following:

- "[T]he total spent on sustainable business programs by large companies (revenues of more than $1 billion) in Australia,

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[21] More than 70 percent of 200 chief financial officers of companies with average annual revenues of $17 billion surveyed reported that they "expect sustainability to have an impact on compliance and risk management" and "more than 60 percent foresee changes to functions like financial auditing and reporting." Deloitte University Press, Sustainable Finance (Jan. 1, 2012), http://dupress.com/articles/sustainable-finance-the-risks-and-opportunities-that-some-cfos-are-overlooking/?top=6 (last visited March 13, 2013).

[22] MIT Sloan Management Review & BCG: The Boston Consulting Group, Sustainability: The 'Embracers' Seize Advantage 18 (Winter 2011), *available at* http://www.bcg.com/documents/file71538.pdf. The authors of this study surveyed "more than 3,000 business executives and managers from organizations located around the world," and included responses from "individuals in organizations in every major industry, ranging from those with fewer than 500 employees to those with more than 500,000 employees." *Id.* at 23; *see also* NRDC Opp. to Cert. at 19-20 & n.12-15 (listing examples of American corporations that have sustainability programs).

Canada, the UK, and the US will reach $60 billion in 2013."[23]

- The growth rates of investment in sustainable business programs are forecasted to be 50 percent to 100 percent higher in 2013 than in 2011.[24]
- "Fully 95% of the world's 250 largest firms regularly report on their environmental performance, highlighting their commitment to sustainability as a tool for reducing risk, improving efficiency, driving innovation, and building intangible value."[25]
- Companies that adhere to principles of "conscious capitalism"[26] outperformed the

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[23] Deloitte University Press, *supra* note 21.

[24] *Id.*

[25] Daniel C. Esty & Steve Charnovitz, *Green Rules to Drive Innovation*, HARVARD BUSINESS REVIEW, March 2012, at 120, 122, *available at* http://hbr.org/2012/03/green-rules-to-drive-innovation/ar/1.

[26] "Conscious capitalism" is a business philosophy that embraces four key principles: having a "higher purpose" besides maximizing profits (e.g., providing service to others, furthering knowledge); optimizing the value of six "interdependent stakeholders" (customers, employees, suppliers, investors, society, and the environment); promoting "conscious leadership" by senior executives that embody the higher purpose of the organization; and creating a "conscious culture" in the workplace that reflects a community of people who are flourishing and self-actualizing. John Mackey, *What Conscious Capitalism Really Is*, CALIFORNIA MANAGEMENT REVIEW, v. 53, no. 3, 83, 83-85 (Spring 2011), *available at* http://www.jstor.org/discover/10.1525/cmr.2011.53.3.83?

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market by a 9:1 ratio over a 10 year period.[27]

- Socially responsible investment funds now attract about $1 out of every $9 invested.[28]
- "According to a 2008 Gallup environmental poll, 83 percent of respondents said that they had changed their shopping and living habits over the last

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searchUrl=%2Faction%2FdoAdvancedSearch%3Fjo%3DCalifornia%2BManagement%2BReview%26q0%3Dwhat%2Bconscious%2Bcapitalism%2Breally%2Bis%26f0%3Dti%26Search%3DSearch%26wc%3Don&Search=yes&uid=3739560&uid=2134&uid=2&uid=70&uid=4&uid=3739256&sid=21101823707521.

[27] Rajendra S. Sisodia, *Conscious Capitalism: A Better Way to Win*, CALIFORNIA MANAGEMENT REVIEW, v. 53, no. 3 at 98, 99 (Spring 2011), *available at* http://www.jstor.org/discover/10.1525/cmr.2011.53.3.98?uid=3739560&uid=2134&uid=2&uid=70&uid=4&uid=3739256&sid=21101823707521.

[28] Steve Wagner, Eric Hespenheide & Kate Pavlovsky, *The Responsible and Sustainable Board*, DELOITTE REVIEW, Issue 4, 59, 63 (2009), *available at* http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/US_deloittereview_ResponsibleSustainableBoard_Jan09.pdf; *see also* Deloitte University Press, *supra* note 18 ("About $3 trillion in the U.S. alone – roughly 12.2% of the $25.2 trillion in total assets under professional management – is committed to some form of socially responsible and sustainable investing, according to the Forum for Sustainable and Responsible Investment"; "[t]he Dow Jones Sustainability Index has outperformed the MSGI World Index, a common measure of developed-country stock performance, in three of the last four years, and outpaced the Dow Jones Global Large-Cap Index in 2009.").

> five years to help protect the environment."[29]

The environment matters. Recent literature stressing this point reveals two relevant trends. First, some industry sectors, especially mining and oil and gas, must garner community goodwill to obtain a "social license to operate." Second, to remain competitive, companies are advised to implement sustainability initiatives deep within their extended supply chains, that is, *beyond* internal operations, direct customers, and suppliers. These trends underscore the proprietary nature of the Port's concession agreement.

1. Industries – Like The Port – Need A "Social License To Operate"

A "social license to operate" is not a formal agreement but an ongoing acceptance that a community grants to a business to operate in that community.[30] Obtaining a social license requires building trust, providing transparency, creating opportunities for public participation, and responding to community

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[29] Wagner et al., *supra* note 28 at 63.

[30] Jason Prno & D. Scott Slocombe, *Exploring the origins of 'social license to operate' in the mining sector: Perspectives from governance and sustainability theories*, RESOURCES POLICY 346 (May 28, 2012), *available at* http://www.sciencedirect.com/science/article/pii/S0301420712000311; Haanses et al., *supra* note 20.

concerns.[31] It requires building community goodwill in order to avoid costly conflict.

Deloitte advises that it is "becoming an imperative for companies to consider broadening their sustainability efforts in the communities in which they operate as well as to the physical environment" in order to "gain the support of the people who live and work in these communities."[32] Obtaining a social license to operate can improve access to capital, bolster a company's reputation, and enhance government relationships.[33] More fundamentally however, it minimizes local community opposition and is "essential . . . to access[ing] the next project."[34]

By way of analogy, the pressure to obtain a license to operate is particularly intense in the mining and oil and gas sector, for reasons that also apply to the Port. For instance, the mining and oil and gas industries, and the Port, leave profound environmental marks on the regions in which they do business,

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[31] Prno & Slocombe, *supra* note 30 at 347-48; Ernst & Young, Business risks facing mining and metals 2012-2013, 26-27, *available at* http://www.ey.com/Publication/vwLUAssets/Business-risk-facing-mining-and-metals-2012-2013/$FILE/Business-risk-facing-mining-and-metals-2012-2013.pdf.

[32] Deloitte, *supra* note 16 at 3.

[33] *See* Ernst & Young, *supra* note 31 at 26.

[34] Ernst & Young, Maintaining a social license to operate, http://www.ey.com/GL/en/Industries/Mining---Metals/Business-risks-facing-mining-and-metals-2012---2013-6-Social-license-to-operate (last visited March 13, 2013).

have substantial investments in their operations,[35] and, unlike other industries, "cannot pick up and move elsewhere" even if community opposition to their presence is strong.[36] Each industry has also suffered from significant delays in getting projects on-line.[37] For the oil and gas industry, conflicts with local communities was a substantial factor contributing to these delays;[38] for the Port, environmental and community opposition was *the* factor. Pet. App. 4a, 121a-122a.

Thus, it is no surprise that over the last five years, Ernst and Young has consistently ranked "maintaining a social license to operate" within the top six risks faced by the metals and mining industry.[39] It is also no surprise that "[m]ore than 80

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[35] Haanses et al., *supra* note 20; Pet. App. 68a-75a.

[36] MIT Sloan Management Review & BCG: The Boston Consulting Group, *supra* note 22 at 11.

[37] Rachel Davis & Daniel M. Franks, *The Costs of Conflict with Local Communities in the Extractive Industry*, SRMining2011, 2 (Oct. 19-21, 2011), *available at* http://shiftproject.org/sites/default/files/Davis%20&%20Franks_Costs%20of%20Conflict_SRM.pdf (reporting that "[a] 2008 study of 190 projects operated by the major international oil companies shows that the time taken for projects to come on-line has nearly doubled in the last decade, causing significant increase in costs"); Pet. App. 75a-79a.

[38] Davis & Franks, *supra* note 37 at 2.

[39] Ernst & Young, *supra* note 34; *see also* Haanses et al., *supra* note 20 ("a company that successfully manages its social and environmental footprint can gain a competitive edge, helping it secure contracts, become a preferred partner, and build long-term relationships with the communities and governments on whose favor it depends. Savvy companies in the mining and [oil and gas] industries recognize that sustainability

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percent of companies in the mining sector reported that concerns about sustainability were changing their business model," and that 71 percent attribute "maintaining a license to operate" as a key driver for these changes.[40] And lastly, it is not surprising that given the environmental, safety, and security concerns created by drayage trucks, the Port adopted the parking and placard provisions to minimize community resistance to its expansion plans. *See* Pet. App. 40a-41a, 46a.

To be clear, communities are emerging as influential stakeholders, and private companies are increasingly responding to community demands to reduce risk and remain competitive. For example, Teck Resources, which has mines and mineral development activities in the U.S., Canada, Chile, Peru, Asia, Europe, and Africa, has changed the way it enters a new region by ensuring that it does not have any pre-existing plans there before talking to the local community and other stakeholders.[41] And Barrick Gold, one of the world's largest gold producers, employs local community members to monitor water discharged from one of its mines.[42]

In our view, the Port needs a social license to operate from the communities of San Pedro and

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is not just about doing the right thing. It is critical to their very survival.").

[40] Haanses et al., *supra* note 20.

[41] Ernst & Young, *supra* note 31 at 27.

[42] *Id.*

Wilmington. With that said, this case is not about resolving whether that belief is accurate. What this case is about – and what the above discussion validates – is that the Port's adoption of the parking and placard provisions to build community goodwill is neither surprising nor extraordinary in today's marketplace given the undisputed facts of this case.

2. Private Companies Are Implementing Sustainability Programs Throughout Their Extended Supply Chains

Even if a company does not need a social license to operate, they are still advised to tackle sustainability "as aggressively as they do cost, quality, speed and dependability" in order to spur innovation and minimize risks.[43] Companies are broadly defining the markets in which they do business to identify sustainability impacts "not only within their own enterprises but across the value chain, both among their suppliers and customers."[44] Of the 2,600 commercial

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[43] *See* Hau L. Lee, *Don't Tweak Your Supply Chain – Rethink It End to End*, HARVARD BUSINESS REVIEW, Oct. 2010, at 62, 69, *available at* http://hbr.org/2010/10/dont-tweak-your-supply-chain-rethink-it-end-to-end/ar/1.

[44] Deloitte, *supra* note 16 at 3; David Kiron et al., *The Innovation Bottom Line*, MIT SLOAN MANAGEMENT REVIEW, Feb. 5, 2013, at 12, *available at* http://aca3318ae75562500643-ca1b2d270cca3d1f89a77092d5cd33a3.r63.cf2.rackcdn.com/MITSMR-BCG-Sustainability-Report-2013.pdf (advising companies to "[c]ollaborate with individuals, customers, businesses and groups beyond the boundaries of the organization.").

enterprises surveyed who reported a change in their business model as a result of sustainability (i.e., environmental, social, and economic issues), an average of 64 percent had changed their product or service offering, and 56 percent had changed their value chain processes.[45]

Leading business consultants have even developed tools to help companies "map" the sustainability impacts of their products during, for example, the design, sourcing, manufacture, delivery, and end of life phases.[46] Through this mapping exercise, a company can identify opportunities and risks "throughout its extended supply chain," and use that information to drive sustainability strategies.[47] Identifying a company's sustainability impacts, however, is just the beginning. Adequately addressing those impacts can require structural changes and managing new relationships, far beyond the traditional buyer/seller relationship.

Nestlé, whose origins date back to 1866, is the largest food and beverage company in the world.[48]

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[45] Kiron et al., *supra* note 44 at 14-15 (noting that the survey analysis was based on responses from 2,600 executives and managers from commercial enterprises, with a wide variety of industries represented).

[46] Deloitte, Sustainability 2.0, http://dupress.com/articles/sustainability-2-0-innovation-and-growth-through-sustainability/?top=6 (last visited March 13, 2013).

[47] *Id.*

[48] Nestlé, History, http://www.nestle.com/aboutus/history (last visited March 13, 2013); Nestlé, Sourcing overview, http://

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Nestlé's portfolio includes brands such as Gerber, Stouffer's, Dryers, Purina, and Power Bar.[49] The company prides itself on "creating shared value" for its shareholders, in which it seeks to encourage "economic and social value simultaneously by focusing on the social issues that [it is] uniquely capable of addressing."[50] Nestlé sources materials from more than 5 million farms, many of which are run by small farmers in poor rural regions of the world.[51] The company's supplier base has approximately 165,000 direct suppliers and 680,000 individual farmers, who deliver materials to Nestlé buying stations.[52]

To ensure that its suppliers develop sustainable and ethical practices, Nestlé established "non-negotiable minimum standards" that its suppliers

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www.nestle.com/csv/ruraldevelopment/sourcingoverview (last visited March 13, 2013).

[49] Nestlé, Our Brands, http://www.nestle.com/aboutus/ourbrands (last visited March 13, 2013).

[50] Nestlé, Nestlé Creating Shared Value Report 2011 at 4, *available at* http://www.nestle.com/asset-library/Documents/Library/Documents/Corporate_Social_Responsibility/2011-CSV-report.pdf. Nestlé has a 12 member Creating Shared Value ("CSV") Advisory Board and has endless information on its website about its CSV platform. Nestlé, CSV Advisory Board, http://www.nestle.com/csv/nestle/csvadvisoryboard (last visited March 13, 2013); Nestlé, Creating Shared Value at Nestlé, http://www.nestle.com/csv/nestle (last visited March 13, 2013).

[51] Nestlé, Sourcing overview, http://www.nestle.com/csv/ruraldevelopment/sourcingoverview (last visited March 13, 2013).

[52] Nestlé, Responsible sourcing and the Nestlé Supplier Code, http://nestle.com/aboutus/suppliers (last visited March 13, 2013).

and its suppliers' employees, agents, and subcontractors must adhere to when conducting business.[53] These standards are embodied in Nestlé's Supplier Code, and require the company's suppliers (and their employees, agents and subcontractors) to, for example,

- Provide, "as a minimum, potable drinking water, adequate sanitation, fire exits and essential safety equipment, access to emergency medical care, appropriately lit and equipped work stations"[54];
- Limit the use of child labor and factories or production facilities that have an unpaid workforce[55]; and
- Ensure compliance with all applicable environmental laws and regulations "in the country where products or services are manufactured or delivered."[56]

If Nestlé becomes aware of a breach in its Supplier Code, it "reserves the right to demand corrective measures," and "to terminate an agreement with any supplier who does not comply with the Code."[57]

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[53] Nestlé, The Nestlé Supplier Code 1 (Aug. 2010), *available at* http://www.nestle.com/asset-library/Documents/Library/Documents/Suppliers/Supplier-Code-English.pdf.

[54] *Id.* at 2.

[55] *Id.*

[56] *Id.* at 3.

[57] *Id.*

Nestlé's Supplier Code is written in 19 languages, including Uzbek, Thai, and Croatian, demonstrating the global influence Nestlé is exerting within its extended supply chain.[58]

Starbucks is the world's "premier roaster and retailer of specialty coffee" with more than 17,000 stores in 55 countries.[59] It is "dedicated . . . to striking a balance between profitability and social conscience," and commits "to buying and serving high quality, responsibly grown, ethically traded coffee."[60] Starbucks believes that its "long-term success is linked to the success of the hundreds of thousands of farmers who grow [its] coffee. . . . [and that] [b]y helping to sustain coffee farmers and strengthen their communities, [it] [will] ensure an abundant supply of high-quality coffee for the future."[61]

In 2010, the Harvard Business Review featured a profile on Starbucks and explained how the company has made its coffee "greener" by changing how it is

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[58] *See* Nestlé, Responsible sourcing and the Nestlé Supplier Code, http://www.nestle.com/aboutus/suppliers (last visited March 14, 2013).

[59] Starbucks, Our Heritage, http://www.starbucks.com/about-us/our-heritage (last visited March 14, 2013).

[60] Starbucks, Being a Responsible Company, http://www.starbucks.com/responsibility (last visited March 14, 2013); Starbucks, Ethical Coffee Sourcing and Farmer Support 1, *available at* http://www.conservation.org/global/celb/Documents/Starbucks_Ethical_Sourcing_Factsheet_2008_2010.pdf.

[61] *Id.*

grown.[62] Historically, Starbucks "had no direct interactions with farmers; it had traditionally purchased coffee from intermediaries such as farm cooperatives, food processors, exporters, and importers."[63] Thus, Starbucks had to find a way to influence its "extended supply chain," which included coffee farmers. In response, Starbucks created Coffee and Farmer Equity ("C.A.F.E.") Practices.[64]

The C.A.F.E. Practices are guidelines that contain more than 200 indicators that aim to improve the social, economic, and environmental performance of coffee farms and mills through, for example, farming and processing practices that protect soil and conserve water and energy, fair labor standards, and health and safety requirements.[65] The guidelines state a "zero tolerance" for the violation of standards that, for example, require wages to be "paid directly and regularly to all workers in cash or cash equivalent . . . and not through labor intermediaries," and that

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[62] Lee, *supra* note 43 at 68.

[63] *Id.*

[64] *Id.*

[65] *Id.*; Starbucks Coffee Company, C.A.F.E. Practices: Generic Scorecard (Jan. 2013), *available at* http://www.scsglobalservices.com/files/CAFE_SCR_Genericv3.1_012513_0.pdf; Starbucks Coffee Company, C.A.F.E. Practices: Smallholder Scorecard (Jan. 2013), *available at* http://www.scsglobalservices.com/files/CAFE_SCR_Smallholderv3.1_012513_0.pdf; Starbucks, C.A.F.E. Practices – Terms & Conditions – Version 3.0, *available at* http://www.scsglobalservices.com/files/C%20A%20F%20E%20%20Practices%20Terms%20and%20Conditions_V3%200_english.pdf.

prohibit further "conversion of natural forest to agricultural production."[66] Starbucks also requires suppliers to document how much of the money Starbucks pays for coffee actually goes to the grower, which is often a small family in Latin America, Africa, or Asia.[67] Suppliers are graded by independent certifiers based on the guidelines, and must score above a certain threshold to be "C.A.F.E. certified."[68] Starbucks buys first from certified farmers and suppliers, and pays premium prices to top scorers and those who show continual improvement.[69]

The geographic reach of Starbucks' C.A.F.E. Practices is vast, effectively influencing how coffee is farmed and milled in 20 countries across four continents.[70] These countries "significantly overlap with eight of the world's most biologically rich but most

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[66] Starbucks Coffee Company, C.A.F.E. Practices: Generic Scorecard, *supra* note 65 at 3 & 11.

[67] Lee, *supra* note 43 at 68.

[68] *Id.*

[69] *Id.* In 2011, 86 percent of Starbucks coffee was "C.A.F.E. Practices" verified. Starbucks, Starbucks Global Responsibility Report – Goals and Progress 2011, Year in Review: Fiscal 2011 at 5, *available at* http://globalassets.starbucks.com/assets/19c68ea6c48a473d865c7327c08d817f.pdf. By 2015, all of Starbucks' coffee will be third-party verified or certified, either through C.A.F.E. Practices or another externally audited system. Starbucks, Ethical Coffee Sourcing and Farmer Support, *supra* note 60 at 1.

[70] Starbucks, Ethical Coffee Sourcing and Farmer Support, *supra* note 60 at 4.

threatened regions," and "[a]ll of the countries supplying coffee via the C.A.F.E. Practices program are developing countries, with over 20% falling in the low income category."[71] Accordingly, positively influencing this aspect of Starbuck's supply chain ensures a long-term supply of coffee in the future while also enhancing its corporate brand, building community goodwill, and minimizing risk.

The fact that corporate America must address the social and environmental consequences of its operations is a marketplace reality. We do not contend, however, that the Port can do everything that a private company can do. The Court of Appeals articulated the limits of State proprietary conduct in this case when it invalidated the concession agreement's employee driver provision. Pet. App. 41a-44a. But the examples of Nestlé and Starbucks are nonetheless useful because they illustrate the breadth of actions private companies are taking to comprehensively manage their social and environmental footprint. Moreover, they illustrate that the parking and placard provisions – by only binding the behavior of those who desire to do business on Port property – fall well within the limits of how private companies act in the marketplace.

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[71] *Id.*

B. The Environmental Underpinnings Of The Concession Agreement Explain The Agreement's Proprietary Nature, Not Detract From It

Notwithstanding the discussion above, the record in this case establishes – by itself – that while the Clean Truck Program was understood to have major environmental benefits, it was adopted as a business necessity. Pet. App. 3a-9a, 73a-95a. As a result, the District Court concluded that the concession agreement was "essentially proprietary." Pet. App. 120a-124a.[72] The Court of Appeals adopted the undisputed

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[72] The District Court held:

> The Concession Agreement helps the Port manage its property and facilities as any private landlord and facilities operator would. . . . Indeed, through the Concession Agreement, [the Port] aims to secure the provision of responsible motor carrier services that are necessary for the maintenance and growth of its commercial operations. . . . As cargo volumes rise, Port revenues increase, and thus to remain competitive the Port has a strong interest in upgrading and expanding its facilities to increase cargo volumes. . [T]he evidence demonstrates that Port-generated air pollution interfered with Port growth and has jeopardized the Port's continued viability as a commercial enterprise. . . . [Environmental and community opposition] effectively stalled all major Port expansion projects for seven years. . . . In response, in order to be able to grow, the Port enacted the Clean Air Action Plan, which spawned the Clean Truck Program and the Concession Agreement, to mitigate Port-generated air pollution from Port-serving vehicles and equipment. . . . [T]he Port adopted the Clean Truck Program, which included the Concession Agreement as a

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findings of the District Court, including the fact that the Port's commercial interests in expansion had been successfully thwarted by environmental litigation and community opposition to Port operations, and relied on such facts to uphold the parking and placard provisions under the market participant doctrine. Pet. App. 6a-8a, 40a-41a, 46a.

ATA asserts that the market participant exception cannot apply to the concession agreement because it "promote[s] specific environmental policies" and is thus "tantamount to regulation or policy making." ATA Br. at 32. ATA also asserts that this Court should limit the market participant exception to government procurement decisions or courts will have difficulty deciphering when States are acting for policy versus proprietary reasons. *Id.* at 31. ATA's arguments are without merit for several reasons.

First, the environmental underpinnings of the concession agreement do not preclude application of the market participant exception. This Court and the Ninth and Second Circuit Courts of Appeals have upheld – under the market participant exception –

> "business necessity," in order to eliminate evident obstacles to its growth. . . . While the Port had not previously required drayage services providers to contract with it to access Port property, it made an economically driven decision to do so via the Concession Agreement in its capacity as a landlord and facilities operator.

Pet. App. 120a-123a.

government requirements that were adopted to protect the environment and public health against Commerce Clause and federal preemption challenges.

In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), this Court applied the market participant doctrine to uphold against a Commerce Clause claim a Maryland program aimed at reducing the environmental impacts associated with old abandoned automobiles that littered the State's streets. 426 U.S. at 802-03, 806-09 ("Maryland entered the market for the purpose, agreed by all to be commendable as well as legitimate, of protecting the State's environment."). The program was upheld even though Maryland was not purchasing vehicles.[73]

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[73] It is true that this Court stated that Maryland was a "purchaser, *in effect*, of a potential article of interstate commerce." *Alexandria Scrap*, 426 U.S. at 808 (emphasis added). However, that fact does not render the case helpful for ATA, which argues that the market participant exception should only apply to government procurement in the narrowest sense. ATA Br. at 31-32 (asserting that the exception should be limited to "a narrow range of state actions directly related to the 'efficient procurement of goods and services'" and that the only way the Port could be a market participant is if it provides or procures drayage services). This is so because Maryland was not actually buying junk cars to operate or scrap them itself. Moreover, the market participant exception has been applied in a number of other "nonprocurement" cases. *See, e.g., Reeves*, 447 U.S. at 440 (South Dakota policy upheld that limited the *sale* of cement by a state plant); *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1043, 1049 (9th Cir. 2000), overruled in part on other grounds by *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424 (2002) (city rotational tow list upheld even though the vehicle

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In *Engine Manufacturers Ass'n v. South Coast Air Quality Management District* ("*EMA*"), 498 F.3d 1031 (9th Cir. 2007), the Ninth Circuit applied the market participant doctrine to uphold air district rules that required state and local governments to purchase alternative fuel vehicles in order to reduce air pollution in the Los Angeles region. 498 F.3d at 1045-46 ("That a state or local governmental entity may have policy goals that it seeks to further through its participation in the market does not preclude the doctrine's application, so long as the action in question is the state's own market participation.") (citing *Alexandria Scrap*, 426 U.S. at 809). The industry association in that case argued that the rules were preempted by the federal Clean Air Act. *Id.* at 1035-37.

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owner, not the city, paid for the towing services); *Four T's v. Little Rock Mun. Airport Comm'n*, 108 F.3d 909, 913 (8th Cir. 1997) (airport fees on ground transportation services upheld because airport provided facilities to the transportation companies; airport was not a purchaser of the services); *Transport Limousine of Long Island v. Port Auth. of N.Y. & N.J.*, 571 F. Supp. 576, 581 (E.D.N.Y. 1983) (same)). These cases illustrate that the key inquiry under the market participant exception is not whether the government has purchased goods or services, but whether the government has a meaningful commercial interest in the challenged requirement. Further, where private actors would perform conduct analogous to the challenged action, it is likely that the exception applies. *Boston Harbor*, 507 U.S. at 231-32.

And in *Sprint Spectrum v. Mills*, 283 F.3d 404, 410, 421 (2d Cir. 2002), the Second Circuit applied the market participant doctrine to uphold restrictions placed by a school district on a telecommunications company that sought to build a cellular communications tower on a high school roof. The restrictions were necessary to protect the health and safety of school children from radio frequency emissions, and were alleged by the plaintiff to be preempted by the Telecommunications Act. *Id.* at 410.

Second, these cases (*Alexandria Scrap*, *EMA*, and *Sprint Spectrum*), in addition to others decided by this Court, demonstrate that neither this Court nor the Courts of Appeals have difficulty deciphering when a State is acting as a market participant or for purely policy reasons. For instance, in *Wisconsin Department of Industry v. Gould*, 475 U.S. 282, 287 (1986), this Court held that the market participant exception did not apply to a State statute where "[n]o other purpose could credibly be ascribed" to the statue other than to "deter labor law violations and reward 'fidelity to the law.'" Similarly, in *Chamber of Commerce v. Brown*, 554 U.S. 60, 70 (2008), this Court held that the market participant exception did not apply to a State statute that was expressly intended to further labor policy. Accordingly, market participant jurisprudence provides no indication that this Court must restrict the application of the doctrine, let alone, limit it to government procurement, as ATA suggests. ATA Br. at 31; *see also supra* note 73.

Third, ATA's reliance on the Court of Appeals' preliminary injunction decision from 2009 and *Boston Harbor* to assert that the concession agreement provisions are "tantamount to regulation and policy making," ATA Br. at 32, is misplaced. The Court of Appeals' 2009 ruling was rendered *before* the trial in the District Court, reflected the Court's then-current views about the parties' likelihood of success, and was based on a limited record. Further, nothing in *Boston Harbor* stands for the proposition that State actions that promote the environment are *per se* regulatory. And in fact, the clean-up of Boston Harbor – the project that necessitated the challenged labor agreement – was in response to a successful environmental lawsuit brought against the state of Massachusetts. *Boston Harbor*, 507 U.S. at 220-21.

The record shows that the Port adopted the concession agreement in response to environmental litigation and ongoing community opposition that threatened the Port's competitiveness. Cases decided by this Court and the Courts of Appeals confirm that the Port legitimately entered into the market to remedy those challenges and protect its economic well-being. We now turn to the two contract provisions at issue.

1. The Parking Provision Furthers The Port's Proprietary Interests

The communities of San Pedro and Wilmington are literally across the street from the Port. Tr. Demonstrative Ex. 2.[74] Drayage trucks frequent these neighborhoods, and the practice of drayage trucks parking in harbor communities has contributed to heavy truck traffic in residential areas, resulting in increased air pollution, noise, and safety hazards for local communities, including hazardous material discharging from leaking containers. Trial Ex. 185 at LAD001213; Pet. App. 40a; Trial Tr. at 79:3-23 (Apr. 28, 2010), ECF No. 338, filed Jan. 14, 2011. Further, drayage trucks account for a disproportionate number of the accidents, traffic violations, and citations for improper vehicle maintenance in the harbor area. Pet. App. 88a. The parking provision sought to deal with some of these problems, but more fundamentally, to reduce community opposition that had precluded infrastructure development for nearly a decade.

As discussed above, in some industry sectors, the failure to build community support for projects is considered one of the sectors' biggest risk factors, and absent such support, projects will not move forward. *Supra* at 24-27. Analogous facts exist here. As a result, the Court of Appeals correctly relied on the District Court's undisputed findings of fact to hold

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[74] This demonstrative exhibit is located in the back cover pocket of the Joint Appendix and consists of a map of the Los Angeles and Long Beach harbors.

that increasing community goodwill was a legitimate business interest given that the community had stymied Port growth through successful environmental litigation. Pet. App. 40a.[75] The majority's decision should be affirmed.

Separate from engendering goodwill, however, the parking provision is proprietary in nature for a second reason – it serves the Port's commercial interest in port security. Pet. App. 40a-41a, 88a, 93a-95a. Neither ATA nor any of the *amici* mention the "port security" rationale for the parking provision in their respective briefs even though the Court of Appeals listed it as an independent basis for upholding the parking provision. Pet. App. 40a-41a.

The Port is served by some 16,000 trucks and thousands of truck drivers. Pet. App. 80a; JA118. There have been cases of unidentified drivers using false identification to gain access to the Port, and instances when drivers have carried unauthorized passengers into Port terminals. JA118-19; Pet. App. 94a-95a. At trial, Captain John Holmes, Deputy Executive Director at the Port,[76] testified about the

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[75] Further, testimony presented at trial indicates that private entities, including marine terminal operators, at the Port have adopted congestion-relief programs to simultaneously address local community concerns about traffic and benefit their business. Trial Tr. at 155:3-157:25 (Apr. 27, 2010), ECF No. 337, filed Jan. 14, 2011.

[76] Capt. Holmes has an extensive background in port safety and security. He served in the U.S. Coast Guard for 27 years, specializing in marine and port safety and security, including

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security risks posed by drayage trucks, including container theft, stolen trucks, and the risk that someone could take over a truck and use the vehicle as a weapon. Trial Tr. at 67:6-19, 69:15-25 (Apr. 23, 2010), ECF No. 336, filed Jan. 14, 2011. These risks are particularly troublesome because the Department of Homeland Security considers the Port part of one of seven "'Group I' port areas at the highest risk of terrorist attack." Pet. App. 40a, 93a. Given the Port's security risks, it is entirely consistent with the Port's commercial interests to know where trucks that enter its facility daily are parked, and to require drayage trucks to be parked in designated locations. The parking provision is designed to do just that.

2. The Placard Provision Furthers The Port's Proprietary Interests

The placard provision was also enacted to increase community goodwill. The majority held:

> The placards help the Port to gather information about the safety of drayage truck operations, both on and off Port property. This information can be communicated to

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serving as the Coast Guard Captain for the Port of Los Angeles under the Department of Homeland Security. Trial Tr. at 55:9-62:5 (Apr. 23, 2010), ECF No. 336, filed Jan. 14, 2011. Capt. Holmes also performed risk assessments and supply chain security and technology evaluations in the private sector, and teaches courses on security issues at the University of Southern California and with the Defense Threat Reduction Agency. *Id.* at 62:6-65:23.

> motor carriers and informs the Port's operations. . . .
>
> The Port adopted the placard provision in response to community concerns about drayage truck operation. The provision invites community participation and increases goodwill, thus facilitating Port expansion.

Pet. App. 45a-46a; *see also* Trial Tr. at 108:6-109:4 (Apr. 23, 2010), ECF No. 336, filed Jan. 14, 2011 (the placard provision enables the community to report trucks that are operating unsafely or in areas where they should not be); Trial Ex. 224 at LA000319 (the placard requirement enables "community members with concerns about truck emissions, safety and operations" to get "immediate action by the Port"). For the same reasons stated above with respect to the parking provision, *supra* 42-43, the Port's adoption of the placard provision to increase community goodwill falls within the market participant exception.

Further, at trial, the proprietary nature of the placard provision was underscored by expert testimony confirming that private companies often require trucks to display telephone numbers so that the public can report unsafe driving. Trial Tr. at 29:10-30:8 (Apr. 28, 2010), ECF No. 338, filed Jan. 14, 2011); *id.* at 81:4-14. Based on such evidence, the Court of Appeals had no trouble holding that "[a]s a facilities provider, the Port has a proprietary interest in receiving complaints about drayage trucks entering, leaving, and operating on its property. A private

facilities provider would do the same." Pet. App. 46a (citing *Boston Harbor*, 507 U.S. at 231-32).

ATA belittles the Port's attempts to build community goodwill, suggesting that catering to such interests would eviscerate FAAAA preemption. ATA Br. at 34. But the Court need not rule that every action to enhance community goodwill falls within the market participant exception in order to affirm the majority's decision. Nor do the facts of this case imply that result.

Moreover, the Court of Appeals set limits on the Port's actions as a market participant when it invalidated the employee-driver provision. Pet. App. 41a-44a ("While the Port may impose conditions on licensed motor carriers seeking to operate on Port property, it cannot extend those conditions to the contractual relationships between motor carriers and third parties."). And the majority found that the parking and placard provisions fell within those limits. Pet. App. 40a-41a (holding that the parking provision does not impact third party behavior because it "binds only those motor carriers operating on Port property, and applies to only those trucks permitted to operate at the Port"), Pet. App. 46a (holding that the placard provision does not impact third party behavior).

Thus, ATA's concern that affirming the majority's decision would undermine the deregulatory purpose of the FAAAA is unfounded. And to the extent currently unidentifiable government actors create a patchwork of requirements in the future that pose a

real-world problem, that is a task for Congress, not the courts, to resolve.

C. *South-Central Timber Development v. Wunnicke* Does Not Preclude Application Of The Market Participant Exception To This Case

The Court of Appeals discussed the environmental and community challenges created for the Port by drayage operations, how those challenges threatened the Port's very existence, and how the parking and placard provisions helped remedy those challenges. Pet. App. 4a, 6a-8a, 40a-41a, 46a. The majority went on to find that the Port could place requirements on motor carriers because the drayage and port markets "are so closely related" – in fact, "interrelated" – "that the Port's interest in managing its facilities can extend to imposing conditions on drayage carriers that operate on Port property." *Id.* at 25a, 27a-28a ("the concession agreements are contracts under which the Port exchanges access to its property for a drayage carrier's compliance with certain conditions"). In so doing, the majority affirmed the Port's ability to respond to environmental challenges as a private actor would. Pet. App. 29a (citing *Boston Harbor*, 507 U.S. at 231-32).

Nevertheless, ATA argues that the market participant exception cannot apply to provisions in the concession agreement because the Port is not a participant in the drayage market. ATA Br. at 32. ATA

relies on a plurality decision in *South-Central Timber Development v. Wunnicke*, 467 U.S. 82 (1984), to argue that the relevant "market" must be narrowly defined, and that the off-street parking and placard provisions amount to impermissible downstream regulation. ATA Br. at 33.[77]

The City of Los Angeles' brief cogently explains that the concession agreement does not affect a "downstream" market since it applies to motor carriers that operate on Port property; it does not restrict third party behavior. We agree with the City's analysis.[78] We add, however, that even if port drayage is characterized as a downstream market, analogous conduct by private companies today instructs that the parking and placard provisions are nonetheless permissible. *Wunnicke* was decided in 1984. To the extent that the plurality's decision may have correctly characterized typical market behavior in the 80's, it is not consistent with the marketplace realities of today.

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[77] ATA also cites *Florida Transportation Services v. Miami-Dade County*, 703 F.3d 1230 (11th Cir. 2012) and *Smith v. Department of Agriculture*, 630 F.2d 1081 (5th Cir. 1980) in support of its assertion. ATA Br. at 33-34. For the reasons cited in the City of Los Angeles' brief, those cases are distinguishable and unpersuasive. City Br. at 33 *et seq.*

[78] The City also correctly points out that the plurality opinion in *Wunnicke* applied "more rigorous" Commerce Clause scrutiny than might otherwise have been warranted because the case involved foreign commerce and restrictions on the resale of a natural resource – facts that do not exist here. City Br. at 33.

In *Wunnicke*, the Court considered whether the market participant exception applied to Alaska's requirement that timber purchased from state lands be processed within the state prior to export. 467 U.S. at 84. At "the heart of the dispute" was a "disagreement over the definition of the market," and specifically, if Alaska was a participant in the timber processing market. *Id.* at 98. If it was, then the market participant exception would permit Alaska's in-state processing requirement.

Ultimately, four justices declined to define Alaska as a participant in the timber "processing" market, concluding instead that Alaska was only a participant in the timber "selling" market. The plurality decision turned on the view that Alaska's "downstream" requirements did not reflect the behavior of a typical seller whose proprietary interests cease once its immediate transaction with a buyer ends. *Id.* at 96-99.

> [A]s a matter of intuition a state market participant has a greater interest as a "private trader" in the immediate transaction than it has in what its purchaser does with the goods after the State no longer has an interest in them. . . .
>
> In contrast to the situation in *White* [460 U.S. 204 (1983)], [Alaska's] restriction on private economic activity takes place after the completion of the parties' direct commercial obligations, rather than during the course of an ongoing commercial relationship

> in which the city retained a continuing proprietary interest in the subject of the contract.

Id. at 98-99; *see also id.* at 96 ("it is clear that the State is more than merely a seller of timber. In the commercial context, the seller usually has no say over, and no interest in, how the product is to be used after sale . . . ").

As we have discussed, today some private companies are compelled to obtain a social license to operate. *See supra* 24 *et seq.* Companies exert their influence both upstream and downstream because they are held accountable for the social and environmental harms that occur outside of their immediate transactions. *Id.* And leading business consultants agree that in the age of social media, where stories travel fast, minimizing risk has become increasingly difficult and initiatives undertaken to protect one's brand must be comprehensive enough to meet that challenge. *See supra* 20.

It would be foolish for Starbucks to limit its business interests to the transactions between its baristas and java-seeking customers, and to disassociate itself from coffee farmers. Similarly, Nestlé could commit corporate suicide if it turned a blind eye to how the crops for its baby food were harvested even though Nestlé is not in the farming business. As a matter of survival – not just profitability – corporate America has a "continuing proprietary interest," *see Wunnicke*, 467 U.S. at 99, in activities

that occur beyond its internal operations, direct customers, and suppliers. As a matter of risk management and to get the next project approved, it has to. The market participant exception is informed by what private parties do. *See Boston Harbor*, 507 U.S. at 231-32. As a result, the exception must recognize shifts in corporate behavior. ATA's reliance on *Wunnicke* ignores these shifts.[79]

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[79] This discussion lends further credibility to the City's argument that application of the market participant doctrine should not turn on a "'relevant market' analysis." City Br. at 31-32 ("*Hughes* asked merely whether Maryland was a participant in 'the market,' 426 U.S. at 806, and *Reeves* similarly assessed simply whether South Dakota was an actor in 'the free market.' 447 U.S. at 437. *White*, 460 U.S. at 211 n.7, specifically added, in fact, that application of the doctrine does not turn on whether there is 'privity of contract' among the relevant actors.").

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

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REPLY BRIEF

No. 11-798

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

"[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992). That cardinal rule applies with particular force to preemption statutes. "When a federal law contains an express preemption clause, we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'" *Chamber of Commerce of U.S.* v. *Whiting*, 131 S. Ct. 1968, 1977 (2011) (quoting *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993)). Yet respondents' briefs focus on everything *but* the language and purpose of the statutes at issue.

Respondents do not seriously dispute that the Port's concession requirements have the "force and effect of law"—and therefore fall within the express preemption provision of the Federal Aviation Administration Authorization Act (FAAAA). Their principal argument is that, even so, the requirements are saved by an unstated market-participant exception. But respondents do not attempt to show how a free-floating market-participant exception is consistent with the text, structure, history, or purpose of the FAAAA.

Respondents prefer to focus on the Port's *motives* for promulgating the concession requirements. But respondents ignore the only intent that matters: Congress's. The Port's requirements fall squarely within the text of the FAAAA's preemption clause and undermine Congress's objectives.

Respondents' efforts to avoid *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61, 64 (1954), evince a similar indifference to congressional intent. Respondents attempt to distinguish *Castle* on the ground that that case dealt with the denial of access to state roads, whereas this case involves the denial of access to a state port. But *Castle*'s holding was not limited to the particular channel of interstate commerce to which a State threatens to deny access.

Respondents also contend that *Castle* is no longer good law in light of the deregulatory shift in federal trucking policy. But Congress has *preserved* the federal scheme on which *Castle* relied. And respondents' suggestion that *Castle* has been overturned by the enactment of the FAAAA's safety exception fails to address the text of that provision, which does nothing to expand state regulatory authority beyond the limits articulated in *Castle*. Finally, respondents' promise that the Port will not punish cured violations through suspension of access to the Port does not obviate the authority claimed in the mandatory concession agreement—nor does it go far enough. The Port still claims the authority to punish motor *carriers* for past and ongoing violations through denial of access. *Castle* forbids that type of "veto power" over interstate trucking operations.

I. THE CHALLENGED CONCESSION REQUIREMENTS FALL WITHIN THE FAAAA'S TEXT—AND CANNOT BE SAVED BY AN UNSTATED MARKET-PARTICIPANT EXCEPTION

1. This is a statutory interpretation case. The only statutory language at issue here is the FAAAA's requirement that, to be preempted under the Act, a

state provision must have the "force and effect of law." 49 U.S.C. § 14501(c)(1); *id.* § 14506(a). At the certiorari stage, however, respondents never mentioned the "force and effect of law" language—except to assert that it is "beside the point." Opp. 13. Now, with more than 100 pages of additional briefing, respondents devote just a few cursory sentences to the text at issue.

As we explained in our opening brief (at 19-23), the challenged requirements have the "force and effect of law" because they are "state-imposed obligations" backed by criminal penalties. *American Airlines* v. *Wolens*, 513 U.S. 219, 228 (1995). Attempting to downplay the criminal penalties, the Port states that Tariff No. 4 imposes those penalties only on marine terminal operators—not on the motor carriers. Resp. Br. 25 n.18.

But it is irrelevant whether the criminal penalties for violating the concession requirements are imposed on terminal operators, motor carriers, or both.[1] Municipal ordinances backed by criminal penalties are provisions carrying the "force and effect of law"—regardless of *who* gets fined or sent to jail. In *Rowe* v. *N.H. Motor Transport Association*, 552 U.S. 364 (2008), a provision held to be preempted by the FAAAA prohibited tobacco retailers from employing

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[1] Tariff No. 4 provides that "no Terminal Operator shall permit access into any Terminal in the Port of Los Angeles to any Drayage Truck unless such Drayage Truck is registered under a Concession or a Day Pass," JA105, and imposes criminal penalties on any person who fails to "comply with any of the provisions of the rules and regulations prescribed by this Tariff," JA85. The concession agreement provides that licensed motor carriers must also "comply with Port of Los Angeles Tariff No. 4." JA53.

delivery services unless those services adhered to specific procedures. Yet there was no question that the provision (which imposed civil penalties on retailers) had the "force and effect of law" even though it told "*shippers* what to choose rather than *carriers* what to do." *Id.* at 372.

The Port also suggests that the concession agreement lacks the "force and effect of law" because it is a "'private agreement.'" Resp. Br. 18-19 (quoting *Wolens*, 513 U.S. at 229 n.5). But requirements promulgated by a government agency and incorporated into a City ordinance cannot qualify as a "private agreement" rather than "state-imposed obligations." And the Port misses the lesson of *Wolens*. *Wolens* held that state-court enforcement of a frequent-flier agreement between an airline and its passengers lacks the "force and effect of law." If, however, a government-owned *airport* imposed a penally enforceable requirement that all airlines offer specific frequent-flier benefits to passengers, that requirement *would* have the "force and effect of law." Here, the Port is invoking the full coercive power of the state to impose substantive standards on motor carriers. That is the very definition of "force and effect of law."

The Port's concession agreements are therefore distinguishable from state-hospital contracts specifying the time or location of a delivery. See California & Washington Br. 3. Such a routine contract would lack the requisite "force and effect of law" because—unlike the Port's requirements here—it is not promulgated by a Board order and codified into a City ordinance; it is not enforced with criminal penalties; it is not a rule of general applicability binding all motor carriers; it does not affect the

conduct of motor carriers even when they are not on state property; it does not regulate the services that one private business (drayage providers) can provide to another private business (terminal operators); and it is not a licensing scheme that restricts access to a crucial channel of interstate commerce. Not all state actions carry the "force and effect of law," but the Port's concession requirements do.

2. Although the Port states in passing (at 24 n.17) that it does "not concede" that the concession requirements have the "force and effect of law," its principal argument is that the statutory language is irrelevant. According to the Port, even if the concession requirements have the "force and effect of law," they nevertheless escape preemption under a market-participation exception that—by the Port's own admission—is disconnected from the statute itself. But the text, structure, and purpose of the FAAAA all show that Congress did *not* tacitly intend to graft a market-participant exception onto the FAAAA.

First, "[the FAAAA] explicitly lists a set of exceptions . . . but the list says nothing about" a market-participant exception. *Rowe*, 552 U.S. at 374. The Port dismisses that argument on the ground that some lower courts have recognized a market-participant exception to the FAAAA—"definitive refutation," the Port contends, of the textual principle articulated in *Rowe*. Resp. Br. 23. But citation to lower-court opinions is no substitute for the statute's language—much less "definitive refutation" of this Court's sensible construction of that language. That is particularly true given that those opinions pay short shrift to the statute's text. See *Millbrook* v. *United States*, 569 U.S. ___, 2013 WL

1222647, at *4 (2013) ("A number of lower courts have nevertheless read into the text additional limitations designed to narrow the scope of the law enforcement proviso. . . . None of these interpretations finds any support in the text of the statute."). In *Tocher* v. *City of Santa Ana*, 219 F.3d 1040, 1049 (9th Cir. 2000), for example, the Ninth Circuit discounted the statutory language, stating that, "[a]lthough the plain language of the [FAAAA] would appear to encompass" the state action, "it is saved from preemption by the municipal-proprietor exception."

The Port also tries to distinguish *Rowe* on the ground that it dealt with the question whether the FAAAA contained a public-health exception, not a market-participant exception. But *Rowe* enunciates a larger principle: When Congress enumerates specific exceptions to a preemption provision, it does not intend courts to read additional exceptions into the statute. "The existence of these carve-outs both evinces congressional sensitivity to state prerogatives in this field and makes it inappropriate for courts to create additional, implied exceptions." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 87-88 (2006).

Second, even though Congress in drafting the FAAAA "copied" the language of the preemption clause in the Airline Deregulation Act (ADA), *Rowe*, 552 U.S. at 370, it *declined* to include the ADA's exception for state-owned airports acting in their "proprietary" capacity. See 49 U.S.C. § 41713(b)(3).[2]

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[2] When a Congress omits from one statute language that it included in other, similar statutes, this Court assumes that Congress intended to omit the language. *Marx* v. *General Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013).

The Port's only response is to say that when the FAAAA was enacted "there was no equivalent to airports as to truck transportation—there are no 'truckports.'" Resp. Br. 26. There might not have been "truckports" in 1994, but there were bus stations, depots, and, of course, major shipping ports—all of which were known to be served by motor carriers and owned by public instrumentalities. See *California* v. *United States*, 320 U.S. 577, 585-86 (1944) ("Congress knew" that a large portion of the nation's dock facilities are "owned or controlled by public instrumentalities").

In any event, respondents' suggestion that Congress did not have "truckports" in mind when enacting the FAAAA is no reason to read into the text an exception that is not there. Congress *did* have motor carriers in mind—and the Port's requirements targeting motor carriers fall squarely within the statute's text. The exceptions to the FAAAA are the ones Congress wrote—not those a litigant thinks Congress would have enacted if only it were better informed about the trucking industry.[3]

Third, the Port dismisses Congress's repeated inclusion of proprietary exceptions in other express preemption statutes. The Port states that many of those exceptions apply only to a narrow subset of

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[3] There is no significance to the California and Washington amici's observation that a prior version of the ADA's proprietary exception stated that nothing in the preemption provision "*shall be construed* to limit" States acting in their proprietary capacity. California & Washington Br. 7 (quoting U.S. Br. 18) (quoting ADA, Pub. L. No. 95-504, § 4, 92 Stat. 1705, 1707-1708 (49 U.S.C. App. 1305(b)(1) (1992))). This Court has stated that the ADA's proprietary exception has independent content. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992).

proprietary actions—purchases for the State's "own use"—whereas the Ninth Circuit's market-participant exception applies to a much broader array of proprietary actions. Resp. Br. 27.

But the Port reaches the wrong conclusion from that observation. If the Port is correct that every preemption clause contains an unstated market-participant exception, there would be no reason for Congress to specify a *narrower* "purchasing" exception; such an exception would already be included in the broader (but unstated) market-participant exception. Indeed, respondents acknowledge (at 26) that their theory would render the ADA's proprietary exception superfluous—which is improper. See *Morales*, 504 U.S. at 386 ("if the preemption effected by" the ADA's express preemption clause "were such a limited one, no purpose would be served by the" ADA's proprietary exception).

3. Respondents next rely on an even more sweeping proposition: They contend that *every* preemption statute (express or implied) contains a free-floating market-participant exception. Resp. Br. 20-21. That argument rests on a profound misunderstanding of *Building & Construction Trades Council* v. *Associated Builders & Contractors* ("*Boston Harbor*"), 507 U.S. 218 (1993).

Boston Harbor addressed an amendment to the National Labor Relations Act (NLRA) permitting employers in the construction industry, but not in other industries, to enter into prehire collective-bargaining agreements. 507 U.S. at 229. The question in the case (which involved *implied* preemption) was whether Congress intended the NLRA to preempt "enforcement by a state authority, acting as the owner of a construction project, of" the type of

prehire agreements authorized by the statute. *Id.* at 220. The Court explained that there "is no reason to expect the[] defining features of the construction industry" that led Congress to authorize prehire agreements "to depend upon the public or private nature of the entity purchasing contracting services." *Id.* at 231. Thus, the Court stated, "[i]n the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction." *Id.* at 231-32.

Latching on to the Court's reference to "express or implied indication by Congress," the Port asserts that *Boston Harbor* creates a presumption that even "express preemption provisions" contain an unstated market-participant exception—unless Congress specifically says otherwise. Resp. Br. 20-21. But that is not what this Court meant by "express or implied indication of Congress." An express preemption clause *is* an "express" indication that Congress meant to preempt state actions falling within the statutory language—without excepting "proprietary" state action from the scope of preemption. The Court's reference to "express" intent does not mean that Congress must append to every express preemption clause the modifier "—including state actions arguably motivated in part by proprietary interests."[4]

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[4] Airports Council International misreads *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 685 (1999). See Airports Br. 14-15. In *Florida Prepaid*, this Court stated (in the sentence after the one quoted by amicus) that the market-participant exception makes sense with respect to "*judicially created* dormant Commerce Clause

Unlike respondents, the Court in *Boston Harbor* looked to the statute at issue (the NLRA), and concluded that Congress did not intend *that statute* impliedly to preempt state enforcement of lawful prehire agreements. Here, in contrast, every indication of congressional intent—express and implied—points the other way.

The Court in *Boston Harbor* also relied on prior decisions interpreting implied preemption under the NLRA to apply only to state *regulations*—and not to other state requirements. 507 U.S. at 227. But the FAAAA's express preemption clause does not just preempt state "regulations." It also preempts any "provision having the force and effect of law." 49 U.S.C. § 14501(c)(1). That difference matters: Congress preempts what it says it preempts *in the statute at issue*—not what is impliedly preempted under another statute.

It is therefore irrelevant whether Congress "presumably was aware" of *Boston Harbor* when it enacted the FAAAA. Resp. Br. 20. Case law interpreting implied preemption under the NLRA cannot trump the plain wording of the FAAAA's express preemption clause. The text is clear, and the Port's actions fall within that text. See *Jimenez* v. *Quarterman*, 555 U.S. 113, 118 (2009) ("[W]hen the statutory language is plain, we must enforce it according to its terms.").

4. Respondents' *application* of the market-participant exception further illustrates just how far they have drifted from the text and purpose of the statute. "What the Commerce Clause would permit

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restrictions," but is *inapplicable* in the sovereign-immunity context. 527 U.S. at 685 (emphasis added).

States to do in the absence of" a statute is "an entirely different question from what States may do with the Act in place. Congressional purpose is of course the ultimate touchstone of pre-emption analysis." *Wis. Dep't of Indus., Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282, 290 (1986) (internal quotation marks omitted).

This Court reaffirmed that principle in *Chamber of Commerce of U.S.* v. *Brown*, 554 U.S. 60 (2008): "[I]t is not 'permissible' for a State to use its spending power to advance an interest that—even if legitimate 'in the absence of the NLRA'—frustrates the comprehensive federal scheme established by that Act." *Id.* at 73-74 (quoting *Gould*, 475 U.S. at 290). Thus, both the existence *and* scope of any market-participant exception depend on the statute at issue. This Court has therefore limited the market-participant exception in NLRA implied-preemption cases (the only statutory cases in which this Court has inferred a market-participant exception) to state actions "specifically tailored to one particular job" and related to "the efficient procurement of goods and services." *Id.* at 70. It is undisputed that the Port's actions here fail both requirements.

Although the scope of any market-participant exception depends on the statute at issue, respondents make no attempt—none—to show how the unbounded market-participant exception they propose is consistent with the text or purpose of the FAAAA. According to respondents' market-participant theory, it doesn't matter if the Port is buying anything, selling anything, spending anything, or even *participating* in the drayage

market.[5] What matters, according to respondents, is the Port's alleged "*objective* in seeking to create community goodwill." Resp. Br. 44 (emphasis added); see also *id.* at 12 n.11, 14, 30, 34, 35, 45, 46 (citing Port's motives and objectives). Indeed, the NRDC's brief is devoted entirely to the observation that businesses are sometimes motivated by community or environmental concerns.[6]

But the FAAAA does not exempt from preemption actions "motivated" by commercial or environmental concerns or actions taken with the "objective" of enhancing community goodwill. Rather, it expressly preempts provisions with the "*force*" and "*effect*" of law—irrespective of the State's motives for enacting such provisions. In *Rowe*, Maine's arguments fo-

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[5] The Port argues that "no market-participant decision has ever" required participation in a relevant market. Resp. Br. 31. But even the dormant Commerce Clause cases cited by the Port undermine that assertion. See *Camps Newfound/Owatonna, Inc.* v. *Harrison*, 520 U.S. 564, 592 (1997) ("In *Alexandria Scrap* we concluded that the State of Maryland had, in effect, entered *the market for abandoned automobile hulks as a purchaser* because it was using state funds to provide bounties for their removal from Maryland streets and junkyards. In *Reeves*, the State of South Dakota similarly participated in *the market for cement as a seller* of the output of the cement plant that it had owned and operated for many years.") (emphasis added and internal citations omitted).

[6] It is irrelevant whether private businesses are sometimes motivated by such concerns. "[I]n our system States simply are different from private parties and have a different role to play." *Gould*, 475 U.S. at 290. A private business might choose to "[l]imit the use of child labor." NRDC Br. 31. But when a *State* forbids the use of child labor (on threat of criminal punishment), it is acting as a regulator, not as a proprietor, *and*—more importantly—doing so through requirements with the "force and effect of law."

cused on the "*reason why* it ha[d] enacted the provisions in question"—to protect the public health. *Rowe*, 552 U.S. at 373-74. But this Court declined to wade into any dispute over the State's motives, holding instead that the FAAAA simply did not contain any exception for actions motivated by public-health concerns. The prospect of endless litigation over a State's motives is yet another reason not to adopt respondent's atextual market-participant exception.

The intent that matters is *Congress's*, not the Port's. The Port's requirements not only fall squarely within the text of the FAAAA's preemption clause; they undermine the "federal Act's ability to achieve its pre-emption-related objectives." *Rowe*, 552 U.S. at 371-72. Congress enacted the FAAAA to prevent state actions that would "impede[] the free flow of trade," Pub. L. No. 103-305, § 601(a)(1)(B), 108 Stat. 1569 (1994), or result in a "patchwork" of "state requirements" that undermine Congress's deregulatory objectives. *Rowe*, 552 U.S. at 373; see H.R. Conf. Rep. No. 103-677, at 87 (1994) ("The need for section 601 has arisen from this patchwork of regulation."). By imposing requirements on motor carriers as a condition to accessing a key channel of interstate commerce, the Port has produced "the very effect that the federal law sought to avoid." *Rowe*, 552 U.S. at 372.[7]

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[7] The NRDC protests that, if state regulation of motor carriers in the guise of market participation creates a patchwork of burdensome requirements, "that is a task for Congress, not the courts, to resolve." NRDC Br. 46-47. But that's exactly backwards. This Court does not read into statutes exceptions that conflict with the text and purpose of the statute on the assumption that Congress will clean up the mess.

To be sure, the Port's actions here *are* regulatory. Market participants do not—because they cannot—impose criminal penalties. "A governmental entity acts as a market regulator when it employs tools in pursuit of compliance that no private actor could wield, such as the threat of civil fines, criminal fines and incarceration." *United Haulers Ass'n* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 438 F.3d 150, 157 (2d Cir. 2006), aff'd, 550 U.S. 330 (2007). And market participants do not impose licensing schemes that restrict access to the channels of interstate commerce.[8]

But the larger point is that a state action that has the "force and effect of law" is preempted by the FAAAA irrespective of whether that action also serves some proprietary interest. "Force and effect of law" is not the converse of "proprietary interest." A state advisory opinion stating that trucks should use snow tires and avoid bridges in inclement weather would lack the "force and effect of law"—even though there is nothing "proprietary" about such an opinion. A state provision requiring all in-state builders to purchase concrete exclusively from a state-owned concrete factory, on the other hand, would have the "force and effect of law"—even though the provision would also advance the State's proprietary goals.

Of course, when a government acts in a proprietary capacity, it *may* also be acting without the "force and effect of law." But such an action would

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[8] It is irrelevant whether the Port helped fund the purchase of some trucks. See Resp. Br. 35. As the court of appeals recognized below, "the concession agreements bind all licensed motor carriers operating at the Port, not merely those who drive Port-subsidized trucks." Pet. App. 44a.

escape preemption because it lacks the "force and effect of law"—the requirement imposed by Congress—not because it advances proprietary interests. The Port's concession requirements have the "force and effect of law" under any reasonable definition of the phrase, and are preempted on that basis.

II. *CASTLE* REMAINS GOOD LAW AND PRECLUDES THE MANDATORY CONCESSION ENFORCEMENT PROVISIONS

1. As we demonstrated in our opening brief (at 36-41), *Castle* prevents the Port from enforcing even otherwise nonpreempted regulations by denying federally licensed motor carriers access to the Port. Respondents do not meaningfully distinguish *Castle*.

First, respondents halfheartedly defend the Ninth Circuit's holding that denying access to the Port "'does not rise to the level of the comprehensive ban at issue in *Castle*.'" Resp. Br. 49 (quoting Pet. App. 32a). But *Castle* does not prohibit only "comprehensive bans" on a motor carrier's operations. It bars the "equivalent of a *partial suspension* of [a motor carrier's] federally granted certificate." *Castle*, 348 U.S. at 64 (emphasis added). A "partial suspension" is, by definition, less than a "comprehensive ban." See *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171, 176-77 (1959) (concluding that a punishment covering three percent of a carrier's operations was "tantamount to a partial suspension").

Second, the Port claims that the denial of access to the Port of Los Angeles is equivalent to the denial of access to "one state highway extending from Cleveland to the Ohio-Michigan border." Resp. Br. 49. In support, the Port cites *Bradley* v. *Public*

Utilities Commission, 289 U.S. 92 (1933), where this Court ruled that a denial of access to a single road did not violate the dormant Commerce Clause. But *Bradley* was issued 20 years before *Castle*—and 2 years before the Motor Carrier Act of 1935, which established the statutory scheme on which *Castle* relied. As discussed below, the federal regulatory scheme currently—as it did when this Court decided *Castle*—grants the federal government comprehensive authority over interstate commerce licensing for motor carriers. *Bradley*'s dormant Commerce Clause analysis is therefore off point.

In any event, denial of access to "an important gateway to interstate and international commerce" (U.S. Br. 30) such as the Port of Los Angeles dwarfs the effect of denial of access to a single state road, when, "[f]or aught that appears, some alternate or amended route was available," *Bradley*, 289 U.S. at 94. As we noted in our opening brief (at 39), denial of access to the busiest container port in the United States would have foreclosed access to $240 billion of cargo value in 2007 alone. See also Pet. App. 69a. Such a ban would "seriously disrupt[]" affected motor carriers' interstate operations. *Castle*, 348 U.S. at 64.

Third, respondents argue that we have failed to make a "showing that suspension or revocation of a motor carrier's concession contract by POLA would result in exclusion of the carrier from any state highway or public road." Resp. Br. 59-60. But nothing in *Castle* suggests that its holding turns on whether the state-owned property from which a licensed motor carrier is excluded is a *road* rather than another channel of commerce. Rather, that artificial limitation is at odds with *Castle*'s animat-

ing concern: the disruption to a licensed motor carrier's interstate operations. The Port is not analogous to a state-owned cement plant (see Resp. Br. 60) but is a gateway to huge amounts of container traffic, including significant streams of international commerce with China, Japan, Taiwan, South Korea, and Thailand, among other countries. Pet. App. 69a. Barring a motor carrier from participating in such commerce effects the partial suspension of federally granted operating authority. *Castle* precludes it.

2. Respondents also argue that *Castle*'s holding has been qualified either by the enactment of the FAAAA or by the deregulatory shift in federal policy toward the trucking industry. Those arguments turn a blind eye to the text and purpose of the statutes at issue.

The Port first contends that our position rests on the premise that "*Castle* somehow overrules the express safety exception adopted by Congress as part of the FAAAA in 1994." Resp. Br. 52. That mischaracterization ignores the terms of the FAAAA's safety exception (which respondents do not quote). The safety exception provides that the FAAAA's preemption clause "shall not *restrict* the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A) (emphasis added); see also *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 439 (2002) (noting that the safety exception protects States' "*preexisting and traditional* state police power over safety" (emphasis added)). As we explained in our opening brief (at 44), the safety exception therefore simply preserves—and does not *expand*—state safety regulatory authority. And that regulatory authority is limited by a statutory regime that gives the federal

government the exclusive authority to grant, suspend, or revoke carriers' interstate operating authority. Nothing in the FAAAA remotely suggests that Congress silently overturned those longstanding limits on the scope of States' regulatory authority.

Castle and the FAAAA therefore present *separate* limits on a State's authority. "*Castle* teaches that even if a state law is not preempted because it falls within an exception to Section 14501(c), the method the State chooses to punish violations of the law might be independently preempted by that provision or due to a conflict with the federal licensing scheme." U.S. Br. 29.[9] Requiring compliance with both the FAAAA's limits on a State's substantive authority and *Castle*'s long-recognized limits on its enforcement powers does not, as the Port suggests (at 52), amount to taking "two bites at the apple"; it simply gives effect to Congress's intent and this Court's precedents.

Respondents' second argument—that "the regulatory regime that was addressed in *Castle* has been superseded," Resp. Br. 53—also fails. As we noted in our opening brief, *Castle*'s holding rested on two particular features of the federal regulatory framework. The Motor Carrier Act of 1935 (1) gave a federal agency (the ICC) the exclusive power to determine whether motor carriers could operate in

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[9] Respondents are therefore wrong to suggest (at 50-51) that *Castle*'s limitations apply only to safety-related concession provisions. *Castle* acknowledges that States may impose "conventional forms of punishment" to promote safety. Nothing in the opinion, however, limits its holding (that States cannot effect a "partial suspension" of a motor carrier's "federally granted certificate") to state actions motivated by safety concerns. 348 U.S. at 64, 65.

interstate commerce, and (2) "placed within very narrow limits" the ICC's exclusive power to suspend or revoke that authority. *Castle*, 348 U.S. at 63. Because respondents cannot demonstrate that either element underlying the *Castle* holding has been altered, that decision continues to govern. See *Transcon. Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 417 (1986) ("Whether [an earlier] decision governs this case depends on whether Congress . . . altered those characteristics of the federal regulatory scheme which provided the basis . . . for a finding of pre-emption."); see also *Kurns* v. *R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1267 (2012).

With respect to the federal government's power to issue interstate commerce licenses, the Port emphasizes changes in the showing a motor carrier must make to obtain interstate operating authority and in the identity of the federal entity charged with granting that authority. The crucial point under *Castle*, however, is that it remains the "[e]xclusive power of the Federal Government to make this determination." *Castle*, 348 U.S. at 63. It is irrelevant whether that task is performed by the Secretary of Transportation (rather than the ICC), and whether the requirements for obtaining interstate operating licenses have changed.

Respondents assert that "there is no functional equivalent in today's deregulated trucking regime to the certificates of convenience and necessity formerly issued by the ICC." Resp. Br. 58. But 49 U.S.C. § 13902(a) continues to set out specific conditions under which the Secretary shall register motor carriers to operate in interstate commerce. Indeed, the ICC Termination Act of 1995, Pub. L. No. 104-88,

109 Stat. 803 (1995), makes clear that the registrations issued under the current regime are the "functional equivalent" of the certificates granted under the prior regime. See 49 U.S.C. § 13905(a) ("PERSON HOLDING ICC AUTHORITY.—Any person having authority to provide transportation or service as a motor carrier, freight forwarder, or broker under this title, as in effect on [the day before the effective date of this section], shall be deemed, for purposes of this part, to be registered to provide such transportation or service under this part.").

As for the second basis for *Castle*'s holding, the federal government continues to have the exclusive authority, subject to specific limits, to revoke or suspend a motor carrier's interstate operating authority. See 49 U.S.C. § 13905(e)-(f). Given Congress's preservation of an exclusive and circumscribed federal power to revoke or suspend operating authority, it would remain "odd if a state [or municipality] could take action amounting to a suspension or revocation" of a licensed motor carrier's right to operate in interstate commerce. *Castle*, 348 U.S. at 64.

More broadly, respondents suggest that the shift to a deregulatory approach at the federal level is by itself enough to displace *Castle*'s preemption analysis. See Resp. Br. 50. As shown above, however, the switch to a market-driven approach has *not* "dismantled" (Resp. Br. 57) a scheme in which the federal government retains exclusive power to grant, suspend, and revoke interstate operating authority—the key features on which *Castle*'s holding rested. And, in any case, "[a] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event

would have as much preemptive force as a decision *to* regulate." *Transcon. Gas Pipe Line Corp.*, 474 U.S. at 422 (quoting *Arkansas Elec. Coop. Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 384 (1983) (emphasis in original)).

As this Court has recognized, Congress made that determination here through enactment of the FAAAA's broad preemption scheme together with the series of statutes deregulating the trucking industry at the federal level. See *Rowe*, 552 U.S. at 373 (noting that "a patchwork of state service-determining laws, rules, and regulations . . . is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace").

3. The Port closes its brief with the conclusory assertion that the Port would show, in some future proceeding, "that it does not claim the authority to punish past, cured violations of the requirements challenged here through suspension or revocation." Resp. Br. 62 (brackets and internal quotation marks omitted). That grudging admission is inconsistent with the veto power actually claimed by the concession agreement at issue—and is in any event insufficient to avoid the square conflict with *Castle*.

Reaffirming that States and municipalities are precluded from exercising "veto power" over federally licensed motor carriers, this Court held in *City of Chicago* v. *Atchison, Topeka & Santa Santa Fe Railway*, 357 U.S. 77 (1958), that the City of Chicago had "*no power* to decide whether [the respondent] c[ould] operate a motor vehicle service between terminals for the railroads because this service is an integral part of interstate railroad transportation authorized and subject to regulation under the

Interstate Commerce Act." *Id.* at 88-89 (emphasis added). Although "counsel for the City" denied that the City would assert such power, the Court stated that it was sufficient "that the City claims at least *some power* . . . to decide whether a motor carrier may transport passengers from one station to another." *Id.* at 85 (emphasis added); see also *R.R. Transfer Serv., Inc.* v. *City of Chicago*, 386 U.S. 351, 357 (1967) (same). Whatever shifting litigating positions respondents choose to adopt in this case, the Port still demands that drayage carriers serving the Port sign a mandatory concession agreement purporting to grant the Port authority to take the very actions precluded by *Castle* and the *City of Chicago* cases.

The Port's admission, moreover, is simply insufficient. As we noted in our opening brief (at 40), the enforcement provisions operate by seeking to impose access restrictions on the licensed motor carrier as a business enterprise, not just on a potentially out-of-compliance truck. We have acknowledged that the "conventional forms of punishment" reserved to States and municipalities under *Castle*, 348 U.S. at 64, include the ability to take an unsafe truck out of service. By drafting the concession requirements and enforcement provisions to target the carrier and not the truck, however, the Port has reserved to itself the authority to conclude that even a carrier's *compliant* trucks may be excluded from the Port based on a finding of current non-compliance at the motor-carrier level. The use of such carrier-level exclusion power results in an order that "cannot be complied with in any way except by complete cessation of operations during the period of suspension." U.S. Br. 31 (quoting Resp. Br. at 15, *Castle*, *supra* (No. 44)). The result is the "partial

suspension" of operating authority precluded by *Castle*.

Because the concession agreement claims the authority to exclude *carriers* and not simply *trucks*, see JA73-83 (Default and Termination provisions), there is no need to remand this case to the Ninth Circuit. The Port cannot arrogate to itself that carrier-level veto power without running afoul of *Castle*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SUPPLEMENTAL BRIEF

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BRIEFS

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IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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SUPPLEMENTAL BRIEF FOR PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

The Solicitor General concedes that the Ninth Circuit:

- reached the wrong result on question 1 presented by the petition (U.S. Br. 9-12);
- analyzed question 2 in a way that conflicts with *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008) (U.S. Br. 18); and
- erred in its analysis of question 3 in distinguishing *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954) (U.S. Br. 22 n.8).

Additionally, the Solicitor General does not dispute that the questions present recurring and nationally important issues implicating other preemption regimes as well as the Federal Aviation Administration Authorization Act (FAAAA). Yet he recommends denying certiorari.[1]

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[1] The Solicitor General's position is in keeping with a pattern of apparent reluctance to support review even when substantial factors warranting certiorari are present. The Solicitor General recommended denial in 21 of the 22 invitation briefs filed between August 26, 2011, and November 30, 2012. The Court has granted review in many of those cases; four have already been argued this Term, and another is awaiting argument. *Ryan* v. *Gonzales* (10-930); *Decker* v. *Northwest Environmental Def. Ctr.* (11-338, 11-347); *Los Angeles Cnty. Flood Control Dist.* v. *NRDC* (11-460); *Vance* v. *Ball State Univ.* (11-556); *Bowman* v. *Monsanto Co.* (11-796). Yet another argued case, *Kirtsaeng* v. *John Wiley & Sons* (11-697), presents an issue on which the Court granted certiorari in 2010 over the Solicitor General's contrary recommendation, but the Court divided evenly in the 2010 case presenting that issue.

The Solicitor General is wrong. He substitutes a multi-factor approach derived from Commerce Clause cases for an analysis of the statutory language on question 1; mislabels a conclusion of law infected by the misinterpretation of *Rowe* as a finding of fact on question 2; and makes up an imaginative alternative ground for decision, advanced by neither the Ninth Circuit nor respondents, on question 3.

I. The "Market Participant" Issue Warrants Review

The Solicitor General acknowledges that the Ninth Circuit erred in its market-participant holding. He concedes that the panel majority erred in ignoring the only relevant point for the purposes of applying the FAAAA's preemption clause—that the concession-agreement requirement is incorporated into a penally enforceable tariff and "[a]ny common-sense understanding of the term 'force and effect of law' is satisfied by a provision backed by 'criminal penalties which only a state and not a mere proprietor can enforce.'" U.S. Br. 9 (quoting *Wash. State Bldg. & Constr. Trades Council* v. *Spellman*, 684 F.2d 627, 631 (9th Cir. 1982)). His analysis of the merits of the market-participant issue further reflects that the Ninth Circuit erred in rejecting every previously recognized limitation on the doctrine. *Id.* at 10-11. Even though that analysis only underscores the conflicts created by the Ninth Circuit's holding, the government claims implausibly that no such conflicts exist and that the Ninth Circuit's error is "factbound" and therefore unworthy of review.

The conflicts identified in the petition are real. Satisfied that no fair reading of the cases could support the Solicitor General's purported distinctions,

we give one example in the margin of the government's erroneous analysis.[2]

But there is a more fundamental reason why this case cries out for review. The *only* statutory language being construed is the requirement in 49 U.S.C. § 14501(c) that a provision, to be potentially preempted, have "the force and effect of law." No one—not respondents, not the Ninth Circuit, not any other court of appeals, and not the Solicitor General—contends that there is statutory language, other than the quoted phrase, to support a market-participant exception to preemption.

Yet what do respondents, the Ninth Circuit, and now the Solicitor General analyze? Not the statute's language, legislative history, or deregulatory pur-

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[2] The Solicitor General distinguishes *Smith* v. *Department of Agriculture*, 630 F.2d 1081 (5th Cir. 1980), because the court "did not appear to consider whether . . . [the State] had commercial interests as a manager of the property integrally linked to the functioning of th[e] market [for produce]" and there was "no plausible argument that the discriminatory restriction related to the State's commercial interest in managing its property." U.S. Br. 13. That account of the issues considered in *Smith* ignores the dissent in the case, which would have rejected the limitation endorsed by the majority to conclude precisely that the State was "a participant in the market for marketplace space." *Smith*, 630 F.2d at 1088 (Randall, J., dissenting); see also *Four T's, Inc.* v. *Little Rock Municipal Airport Comm'n*, 108 F.3d 909, 912 (8th Cir. 1997) (concluding dissent in *Smith* was "more persuasive" on market-participant issue). And the Solicitor General does not address the conclusion in *Florida Transportation Service, Inc.* v. *Miami-Dade County*, 757 F. Supp. 2d 1260, 1282 (S.D. Fla. 2010), now pending on appeal to the Eleventh Circuit, that *Smith* compelled rejection of a market-participant defense that the Port of Miami raised in support of an attempt to impose restrictions on stevedores analogous to the Port of Los Angeles's effort here. See Pet. 13.

pose. Instead, they analyze this Court's cases concerning the judicially developed market-participant exception to invalidation of state statutes under the dormant Commerce Clause.

Other than a citation to lower-court cases with no effort to support their reasoning (or to grapple with the contrary reasoning of *City of Charleston* v. *A Fisherman's Best, Inc.*, 310 F.3d 155, 178-79 (4th Cir. 2002)), the Solicitor General's explanation for urging this Court to examine off-point constitutional precedents is "Cf. *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 228-229 & n.5 (1995)." U.S. Br. 7. Nothing on those pages supports the enormous leap taken. The Solicitor General also cites cases involving *implied preemption under the NLRA*. U.S. Br. 7-8. But he makes no effort to contend with the crucial distinction between implied-preemption cases (in which there is no preemptive statutory language to construe) and express-preemption cases like this one—even though petitioner has highlighted that distinction. Pet. 31-32; Reply Br. 2.

If the lawyer who speaks to this Court for the Executive Branch insists in a statutory case that off-point constitutional doctrine should be analyzed instead of statutory text and purpose, something is terribly wrong. "[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted). The error is all the more striking for a reason the Solicitor General does not address: in the ADA (whose preemption clause was the model for the FAAAA's, with identical language regarding provisions with "the force and effect of law," see 49 U.S.C. § 41713(b)(1)), when Congress wanted to include a "proprietary" exception

for municipally owned airports, it did so expressly. See Pet. 29-30.

Only the legerdemain of substituting Commerce Clause analysis for the tools of statutory construction allows the Solicitor General to characterize the error in this case as "factbound." Not even respondents contend that the concession agreements lack the "force and effect of law." Rather, respondents contend that the statutory language is "beside the point." Opp. 13. The Solicitor General acknowledges that the concession agreements have the "force and effect of law," but his Commerce-Clause-centric analysis requires him to analyze "[f]our considerations, taken together," and "some considerations that might be thought to cut the other way." U.S. Br. 9, 11. *Nothing that the Solicitor General cites, other than the first factor, is relevant.* It is, instead, dispositive—under clear statutory language rather than mushy constitutional tests—that the agreements are incorporated into a tariff that is penally enforceable. See U.S. Br. 9. A penally enforceable requirement has "the force and effect of law," and *no one before this Court contends otherwise.*

The error in this case is not factbound. It is a fundamental *legal error*: substituting irrelevant constitutional doctrine (applicable only if Congress has *not* acted) for the ultimate touchstone, the intent of Congress. This case merits review.

II. The "Financial Capability" Holding Was Based On The Ninth Circuit's Error In Interpreting "Related To A Price, Route, Or Service"

The government agrees that the court below espoused a narrow understanding of the key language

in the FAAAA's preemption clause even though *Rowe* "clearly embraced a broader understanding of 'service.'" U.S. Br. 18 & n.5.[3] It agrees "as a general matter" that "a state law 'specifically targeted' at the subject matter of a federal statute" falls within an express preemption clause. U.S. Br. 19. It argues, however, that review should be denied as to question 2 because the Ninth Circuit's analysis turned on an "unchallenged factual finding" regarding the effect of the "financial capability" provision on prices, routes, or services. U.S. Br. 16. Nonsense.

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[3] The Solicitor General asserts that "[t]he validity of the Ninth Circuit's pre-*Rowe* standard is now before that court, and the government has filed an *amicus curiae* brief arguing that it was abrogated by *Rowe*." U.S. Br. 18 n.5. The government's *amicus* brief in that proceeding, however, did not address the decision in *American Trucking*. In their reply, appellants correctly cited *American Trucking*—along with *Ventress* v. *Japan Airlines*, 603 F.3d 676 (9th Cir. 2010), and the since-withdrawn *Ginsberg* v. *Northwest, Inc.*, 653 F.3d 1033 (9th Cir. 2011), *withdrawn and superseded on denial of reh'g by Ginsberg* v. *Northwest, Inc.*, 695 F.3d 873 (9th Cir. 2012)—as reflecting the Ninth Circuit's "repeated, affirmative rejections of a broader standard" for interpreting "service" under the ADA and FAAAA. Appellants' Reply Br. at 5, *Nat'l Fed'n of the Blind v. United Airlines, Inc.*, No. 11-16240 (Dkt. 31) (Nov. 11, 2011). The fact that the Ninth Circuit will now get a fourth chance to stop disregarding binding precedent from this Court is no reason to wait. In this regard, we note that the Court granted certiorari the afternoon of December 7, 2012, in No. 12-52, *Dan's City Used Cars, Inc.* v. *Pelkey*. Because *Pelkey* involves the meaning of "related to" and "service" in Section 14501(c), this case should at least be held for *Pelkey*. However, *Pelkey* involves the meaning of those words in a very different factual context, and has nothing to do with the first or third question presented in this case. Because there are three certworthy questions in this case, and because a decision in *Pelkey* is unlikely to be any more effective than *Rowe* was in reining in the Ninth Circuit, the petition should be granted for plenary review, not just held for *Pelkey*.

Rowe, 552 U.S. at 370-73, demonstrates how to conduct an analysis of whether a challenged provision "relate[s] to" a price, route, or service so as to be within the scope of FAAAA preemption. See also *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-391 (1992); *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 226 (1995). Nowhere does *Rowe* suggest (nor did *Morales* or *Wolens* suggest) that it is a question of fact rather than law whether a challenged provision has only a "tenuous, remote, or peripheral" effect on rates, routes, or services. Rather, this Court in *Wolens* reversed in relevant part a decision of the Supreme Court of Illinois purporting to determine that frequent-flyer programs were related only "tenuously" to an airline's rates, routes, or services. 513 U.S. at 226. The Court thought the question so clear that there was no need to "dwell on" it. *Ibid.* The Court certainly did not suggest that the question required factfinding, rather than a comparison of the challenged state regulation with the language and deregulatory purposes of the statute and with the only examples this Court has ever given of a "tenuously" related provision: state gambling and prostitution laws. *Morales*, 504 U.S. at 390.

Here, every provision of the concession agreements, including the financial-capability provision, is specifically targeted at motor carriers. The gaping chasm between such provisions and general state laws like gambling and prostitution laws cannot be bridged by a supposed "factual finding" of "*no* effect on the subject matter." U.S. Br. 19.

In fact, it was only by erring in *both* respects we highlighted (Pet. 20-26) that the Ninth Circuit rested its decision on the irrelevant "factual" ground identified by the Solicitor General.

First, the Solicitor General fails, as the Ninth Circuit did, to address fully the *specifically targeted* nature of the financial-capability provision and the concession agreements in general. See Pet. 21-24. As the Eleventh Circuit has recognized, a provision implicating the subject matter of the ADA's or FAAAA's preemption clauses will be preempted if it "directly regulates such services *or* . . . has a significant economic impact on them."[4] Here, the Port's mandatory concession agreements *directly* target motor carriers, such that establishing a given provision's "significant economic impact" is beside the point.[5] The Ninth Circuit's surprising conclusion that what amounts to a licensing scheme for motor carriers represents a "borderline" case of preemption, Pet. App. 18a, is made possible only by ignoring this wealth of conflicting authority as to the import of a specifically targeted requirement. The United States recognized as much in its earlier submission to the Ninth Circuit in this case. U.S. *Amicus* Br. 8-9, *quoted in* Pet. 23-24.

Second, the Solicitor General's effort to suggest that the Ninth Circuit's continued endorsement of its pre-*Rowe* interpretation of "rates, routes, and services" did not infect its legal conclusion regarding the financial-capability provision also fails. Although the Ninth Circuit did invoke *Rowe* in its discussion of what constitutes a "service" under the FAAAA, it did

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[4] *Branche* v. *Airtran Airways, Inc.*, 342 F.3d 1248, 1258-59 (11th Cir. 2003) (emphasis added), *quoted in* U.S. Br. 19.

[5] *Cf. Greater Washington Bd. of Trade* v. *Dist. of Columbia*, 948 F.2d 1317, 1322 n.13 (D.C. Cir. 1991) (exception to ERISA preemption for state laws that "affect benefit plans in a tenuous or peripheral manner . . . applies only to laws of general application; it does not protect state laws which specifically refer to ERISA benefit plans") (quoting *In re Dyke*, 943 F.2d 1435, 1448 (5th Cir. 1991)), *aff'd*, 506 U.S. 125 (1992).

so only as a citation ostensibly *supporting* its reaffirmation of a "public utility" understanding of the key language in the FAAAA's preemption clause. Pet. App. 17a-18a. At no point either in its reaffirmation of pre-*Rowe* circuit law or in its discussion of the financial-capability provision (Pet. App. 17a-18a, 33a-34a) did the Ninth Circuit give any indication that it understood the term "service" in the FAAAA to extend more broadly to the "[contractual] features" of motor carrier transportation as its sister circuits have, see *Northwest Airlines, Inc.* v. *Duncan*, 531 U.S. 1058 (2000) (dissent from denial of certiorari) (alteration in original) (quoting *Hodges* v. *Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc)).

The incompatibility of the Ninth Circuit's analysis with *Rowe* is at this point uncontested. Pet. 25-26; Opp. 30-31; Reply Br. 8-9; U.S. Br. 18 & n.5. The only contested point is whether the Ninth Circuit's admitted failure to follow controlling precedent of this Court mattered to its decision. This Court should either grant plenary review, or summarily reverse for the Ninth Circuit to apply the correct standard.

III. The Decision Below Conflicts With *Castle*

The sole basis the panel majority gave for distinguishing *Castle* was that the "limitation on access to a single Port" provided for by the concession agreements supposedly does not rise to the level of a "ban on using all of a State's freeways." Pet. App. 32a. The Solicitor General agrees with petitioner that the distinction is "immaterial, . . . given the importance of the Port to interstate and international commerce." U.S. Br. 22 n.8. And the Solicitor General conspicu-

ously fails to agree with respondents (Opp. 36-38) that *Castle* and the cases following it are no longer good law. That is enough to justify a grant of certiorari.

Nevertheless, the Solicitor General implausibly claims that the Ninth Circuit's holding does not conflict with *Castle*. He argues that "it is not clear that the Port would punish violations of the provisions at issue here through a 'total suspension of the carrier's right to use [the Port],'" despite the provisions of the concession agreement giving the Port just that authority. U.S. Br. 21. That argument should not be considered because it was not raised below or by any party in this Court. In any event, the Solicitor General is wrong.

The Port's mandatory concession agreement provides unambiguously that "[a]ny failure to comply with the terms and conditions of this Concession" constitutes a default under the agreement. 3 C.A. E.R. 485. It further states that, in the event of a default not timely cured, the Port may consider the concession agreement terminated and "may deny *any and all* access to Port property by the Concessionaire." *Ibid.* (emphasis added). Upholding that remedy cannot be reconciled with *Castle*'s holding that a State cannot enforce otherwise valid safety regulations through even a partial suspension of a federally licensed motor carrier's right to use a State's highways. 348 U.S. at 64-65.

The government provides no support for its novel objection that a plaintiff seeking to challenge a state or local remedy inconsistent with *Castle* must wait to bring suit until the punishment has been levied against it. To the contrary, the government recog-

nized in its Ninth Circuit *amicus* brief (at 10) that "a federal system of broad deregulation is susceptible to disruption by state or local officials' attempts to 'exercise veto power' by imposing a licensing requirement to provide services." A lawsuit can be brought to avoid such disruption if a local governmental entity "*claims at least some power* . . . to decide whether a motor carrier may" transfer goods to and from the Port. *R.R. Transfer Serv., Inc.* v. *City of Chicago*, 386 U.S. 351, 357 (1967) (emphasis added) (quoting *City of Chicago* v. *Atchison, Topeka & Santa Fe Ry.*, 357 U.S. 77, 85 (1958)). The Port claims such power here, and the Ninth Circuit's decision upholding that power should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 11-798

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v.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTIONS PRESENTED

Section 14501(c) of Title 49 preempts a state or local "law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier * * * with respect to the transportation of property." 49 U.S.C. 14501(c)(1). Section 14506(a) similarly preempts a state or local "law, rule, regulation[,] standard, or other provision having the force and effect of law that requires a motor carrier * * * to display any form of identification on or in a commercial motor vehicle * * * other than forms of identification required by the Secretary of Transportation." 49 U.S.C. 14506(a). Through a standard-form concession agreement, the Port of Los Angeles, a municipal entity, requires motor carriers providing drayage services at the Port to comply with a number of requirements, including, as relevant here, (i) submitting an off-street parking plan; and (ii) displaying on vehicles placards that provide a phone number for members of the public to report environmental or safety concerns.

The questions presented are as follows:

1. Whether the off-street parking and placard requirements are not preempted by Sections 14501(c) and 14506(a) because they lack "the force and effect of law."

2. Whether *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954), prohibits the Port from barring access by an interstate motor carrier as punishment for violating requirements of the concession agreement that are not preempted.

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INTEREST OF THE UNITED STATES

The questions presented in this case concern whether federal law preempts certain provisions of a concession agreement that the Port of Los Angeles requires motor carriers to sign in order to provide drayage services at the Port. The United States has an interest in achieving the deregulatory objectives of the pertinent federal statutes by eliminating unwarranted burdens on motor carriers imposed by state or local laws. At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. a. Federal regulation of trucking began in 1935 when Congress enacted the Motor Carrier Act, ch. 498, 49 Stat. 543. That statute prohibited, *inter alia*, common carriers of persons or property by motor ve-

hicle from engaging in interstate or foreign transportation unless they first obtained a "certificate of public convenience and necessity" from the Interstate Commerce Commission (ICC). ch. 498, §§ 203(14), 206(a), 49 Stat. 544, 551; see *McDonald* v. *Thompson*, 305 U.S. 263, 265 (1938). The ICC was authorized to issue a certificate only if it found that "the proposed service * * * is or will be required by the present or future public convenience and necessity." ch. 498, § 207(a), 49 Stat. 551-552. Once issued, however, a certificate could be suspended or revoked by the ICC only if the carrier willfully violated the terms of the certificate or federal law and only after notice and a hearing. § 212(a), 49 Stat. 555. The Motor Carrier Act also gave the ICC broad authority to regulate interstate motor carriers' rates, routes, and services. See §§ 204, 216-218, 49 Stat. 546, 558-563.

The Motor Carrier Act contained no provision expressly preempting state laws. In a number of cases, this Court applied conflict-preemption principles to assess the compatibility of state laws with the federal act and its implementing regulations, upholding a variety of state and local laws against preemption challenges. See *H.P. Welch Co.* v. *New Hampshire*, 306 U.S. 79, 83-85 (1939) (law limiting drivers' hours); *Ziffrin, Inc.* v. *Reeves*, 308 U.S. 132, 140 (1939) (law barring federally licensed motor carriers from transporting alcoholic beverages), abrogated on other grounds by *Granholm* v. *Heald*, 544 U.S. 460 (2005); *Maurer* v. *Hamilton*, 309 U.S. 598, 599, 604-610 (1940) (law prohibiting operation of certain vehicles carrying other vehicles); *California* v. *Zook*, 336 U.S. 725, 726-727, 735-738 (1949) (law prohibiting transportation by carrier without ICC permit); *Buck* v. *California*, 343

U.S. 99, 101-103 (1952) (permit requirement for taxicab drivers in excess of ICC regulations); *Lloyd A. Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 158, 161-163 (1952) (permit requirement for contract carriers not registered with ICC).

In *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954), this Court considered an Illinois statute limiting the weight of freight that could be carried in ICC-registered commercial trucks and punishing repeated violations through a "total suspension of the carrier's right to use Illinois state highways for periods of ninety days and one year." *Id.* at 62. The Court held, consistent with its prior holding in *Maurer*, *supra*, that the Motor Carrier Act left to the States the regulation of sizes and weights of trucks. See 348 U.S. at 64. But it concluded that forbidding the carrier from using the State's highways was "equivalent to a partial suspension of [the carrier's] federally granted certificate" and was therefore preempted. *Ibid.* Given that "Congress had placed within very narrow limits the [ICC's] power to suspend or revoke an outstanding certificate," the Court explained, "it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate." *Id.* at 63-64. The Court made clear, however, that States were free "to enforce their laws against recalcitrant motor carriers" through "conventional forms of punishment" and could petition the ICC to revoke the carriers' federal certificates. *Id.* at 64.

b. Congress partially deregulated the trucking industry in 1980 after finding that "the existing regulatory structure ha[d] tended in certain circumstances to inhibit market entry, carrier growth, maximum uti-

lization of equipment and energy resources, and opportunities for minorities and others to enter the trucking industry." Motor Carrier Act of 1980, Pub. L. No. 96-296, § 3, 94 Stat. 793. The 1980 act addressed those problems in part by making it easier to obtain a certificate from the ICC and by giving motor carriers "greater freedom to establish rates free of regulatory interference." H.R. Rep. No. 1069, 96th Cong., 2d Sess. 14, 24 (1980). Congress also found that "individual State regulations and requirements * * * [we]re in many instances confusing, lacking in uniformity, unnecessarily duplicative, and burdensome," and it directed relevant federal agencies to study the problem. § 19, 94 Stat. 811.

c. Fourteen years later, Congress enacted the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, 108 Stat. 1569. Although that legislation principally addressed aviation issues, it included a provision preempting state and local regulation of trucking. See § 601(c), Tit. VI, 108 Stat. 1606. That provision, now codified at 49 U.S.C. 14501(c), generally bars state and local governments from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier * * * with respect to the transportation of property." 49 U.S.C. 14501(c)(1). A "motor carrier" is defined as "a person providing motor vehicle transportation for compensation." 49 U.S.C. 13102(14) (Supp. V 2011). Section 14501(c) expressly exempts from preemption, *inter alia*, "the safety regulatory authority of a State with respect to motor vehicles" and "the authority of a State to regulate motor carriers with regard to minimum amounts of

financial responsibility relating to insurance requirements and self-insurance authorization." 49 U.S.C. 14501(c)(2)(A).

In enacting Section 14501(c), Congress found that "the regulation of intrastate transportation of property by the States ha[d] * * * imposed an unreasonable burden on interstate commerce"; "impeded the free flow of trade, traffic, and transportation of interstate commerce"; and "placed an unreasonable cost on the American consumers." § 601(a)(1), Tit. VI, 108 Stat. 1605. The immediate impetus behind the provision was the Ninth Circuit's decision in *Federal Express Corp.* v. *California Public Utilities Commission*, 936 F.2d 1075 (1991), cert. denied, 504 U.S. 979 (1992). That case had held that the preemption provision of the Airline Deregulation Act of 1978 (ADA), 49 U.S.C. 41713(b), prohibited California from regulating Federal Express's motor-carrier operations because Federal Express was organized as an air carrier, but the decision's reasoning had left California free to regulate Federal Express's competitors not organized as air carriers, "putting [them] at a competitive disadvantage." H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. 87 (1994) (1994 Conference Report). Section 14501(c) was designed to ensure that both air carriers and motor carriers of property had the benefit of "the identical intrastate preemption of prices, routes, and services as that originally contained" in the ADA. 1994 Conference Report 83. Accordingly, the language of Section 14501(c) is nearly "identical to the preemption provision" in the ADA and was "intended to function in the exact same manner with respect to its preemptive effects." *Id.* at 85; see *Rowe* v. *New*

Hampshire Motor Transp. Ass'n, 552 U.S. 364, 368 (2008).

d. Three days after enacting Section 14501(c), Congress enacted the Trucking Industry Regulatory Reform Act of 1994, which further reduced the showing needed to obtain a certificate from the ICC. See Pub. L. No. 103-311, Tit. II, § 207, 108 Stat. 1687 (1994). The following year, Congress abolished the ICC and transferred many of its functions to the newly established Surface Transportation Board. See ICC Termination Act of 1995, Pub. L. No. 104-88, Tit. I, Subtit. IV, §§ 101, 201, 109 Stat. 804, 932-934. The Board and the Secretary of Transportation now have jurisdiction over interstate motor carriers, 49 U.S.C. 13501, which are required to register with the Secretary, 49 U.S.C. 13901. The Secretary must grant registration to any applicant "willing and able to comply" with relevant federal statutes and regulations, 49 U.S.C. 13902(a)(1) (Supp. V 2011); see *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 758-759, 766 (2004), and must follow statutorily prescribed procedures to suspend or revoke a license on specified grounds, 49 U.S.C. 13905(d) (Supp. V 2011), (e)-(f).

e. In a 2005 transportation statute, Congress added Section 14506(a) to Title 49, which, in language similar to Section 14501(c), generally preempts "any law, rule, regulation[,] standard, or other provision having the force and effect of law that requires a motor carrier * * * to display any form of identification on or in a commercial motor vehicle" other than those required by federal law. Unified Carrier Registration Act of 2005, Pub. L. No. 109-59, Tit. IV, Subtit. C, § 4306(a), 119 Stat. 1773. Unlike Section 14501(c),

however, that provision contains no safety exception. 49 U.S.C. 14506(b) (Supp. V 2011).

2. a. The Port of Los Angeles is an independent division of the City of Los Angeles. Pet. App. 5a. It owns terminal facilities and leases those facilities to "terminal operators," such as shipping lines and stevedoring companies, which load and unload cargo from docking ships. *Id.* at 5a-6a, 70a. The cargo is placed onto drayage trucks for transport to customers or long-distance shippers. *Id.* at 6a. Motor carriers, each of which may operate numerous trucks, provide drayage services through arrangements with ocean carriers, cargo owners, and others, but do not enter into drayage contracts with the Port itself. *Id.* at 71a.

The Port is self-sustaining through the revenues it receives from leases and dockage fees. Pet. App. 70a. Operations at the Port are governed by a tariff promulgated by the Board of Harbor Commissioners, a body whose members are appointed by the mayor of Los Angeles and confirmed by the city council. See *id.* at 83a & n.5. The tariff recites that a violation of its provisions constitutes a misdemeanor subjecting the violator to a fine of $500 and imprisonment of up to six months, and that "[e]ach person shall be guilty of a separate offense for each and every day during any portion of which any violation of any provision of this Tariff is committed." J.A. 86; see L.A., Cal., Ordinance 180340 (adopting provision); see also Cal. Gov't Code § 36900(a) (West 2008).

b. In 2008, as part of a "Clean Air Action Plan" to address community opposition to expansion of the Port's facilities and to reduce the Port's contribution to air-quality problems in the region, the Board amended the tariff to require any drayage-service

provider seeking access to the Port's premises to enter into a standard-form "concession agreement" with the Port. Pet. App. 79a-90a; see J.A. 107-126. That agreement grants the concessionaire "a non-exclusive license to access [the] Port property for the purpose of transporting containers and/or other cargo to and from marine terminals." J.A. 42. In exchange, the concessionaire must agree to comply with a number of requirements. As particularly relevant here, it must (i) submit an off-street parking plan for all of its permitted trucks; (ii) display on its trucks placards that provide a phone number for reporting environmental or safety concerns; (iii) demonstrate that it has sufficient financial resources to perform its obligations under the agreement; and (iv) ensure that vehicle maintenance is conducted in accordance with the manufacturer's instructions. J.A. 49-52. The agreement also sets forth fees and insurance requirements. J.A. 59-69.

The concession agreement enumerates several "Events of Default," including "[a]ny failure to comply with the terms and conditions" of the agreement. J.A. 73-74. A concessionaire must cure a default within the time specified in the Port's notice of default or, if "the nature of the Default is such that it cannot be cured within" that time, "take substantial steps toward corrections within the cure period, and diligently continue efforts to complete the cure of the Default as soon as is reasonably practicable." J.A. 73. The Port may also impose penalties for cured defaults, subject to a hearing if the concessionaire chooses to contest the citation. For a "Minor Default" (a term that is not defined in the agreement), the penalties are limited to a warning letter, an order for corrective action or

course of education, or an order of restitution for the cost of the investigation. J.A. 81-82. For a "Major Default" (also generally undefined), the penalties also include suspension or revocation of the concession agreement and the right of the concessionaire to use the Port's facilities. J.A. 82. The Port may deem the failure to comply with an ordered remedy, including an order to cure, a Major Default. J.A. 83.

3. Petitioner, a trucking-industry trade group, filed this suit against the City of Los Angeles and the Port in July 2008 and ultimately sought to enjoin specified requirements of the concession agreement under, *inter alia*, Section 14501(c) and (with respect to the placard provision) Section 14506(a). Pet. App. 61a. After holding a bench trial, the district court found none of the provisions preempted. *Id.* at 137a.

4. A divided panel of the court of appeals largely affirmed the district court, Pet. App. 1a-58a, reversing only as to a requirement of the concession agreement not relevant here, *id.* at 41a-44a.

a. The court of appeals first held that the financial-capability requirement is not "related to a price, route, or service of any motor carrier." See Pet. App. 33a-34a. It rested that conclusion on the district court's finding that the Port was unlikely to invoke that requirement to deny any drayage-service provider access to the Port. *Id.* at 34a.

The court of appeals then held that the off-street parking requirement does not have "the force and effect of law" because, rather than regulating the drayage market, it advances the Port's own interest as a participant "in the market as a manager of Port facilities." Pet. App. 25a; see also *id.* at 16a, 38a-41a. The court viewed the concession agreement as a "con-

tract[] under which the Port exchanges access to its property for a drayage carrier's compliance with certain conditions," rather than as an exercise of the Port's regulatory power. *Id.* at 25a. The off-street parking requirement, it concluded, was "designed to address specific proprietary problems"—in particular, the need to "increase the community good-will necessary to facilitate Port expansion." *Id.* at 40a.

The court reached the same conclusion with respect to the placard requirement. See Pet. App. 44a-46a. The court also found that the placard requirement falls within Section 14501(c)'s safety exception, but held that if it had "the force and effect of law," it would be separately preempted by Section 14506(a), which contains no safety exception. *Id.* at 46a.

Finally, the court of appeals held that the maintenance requirement falls within the safety exception of Section 14501(c). Pet. App. 34a-38a.

b. The court of appeals rejected petitioner's argument that this Court's holding in *Castle* "preclude[s] the Port from permitting access only to motor carriers that comply with its safety restrictions." Pet. App. 30a-32a. "Even if the [FAAAA] incorporated (rather than modified) *Castle*'s limitations on the State's authority," it held, "a denial of access to the Port * * * does not rise to the level of the comprehensive ban at issue in *Castle*." *Id.* at 32a.

c. Judge N. Randy Smith dissented in part. Pet. App. 47a. He concluded that "the market participant exception to preemption does not apply" here because "[t]he Port acts as a regulator (rather than a market proprietor) of drayage services." *Id.* at 47a-48a. He also believed that "although the Port can avail itself of the traditional remedies discussed in *Castle*" to en-

force non-preempted safety regulations, "it cannot step into the shoes of the federal government and partially revoke drayage carriers' access to the channels of interstate commerce." *Id.* at 56a.

SUMMARY OF ARGUMENT

A. The court of appeals erred in concluding that the off-street parking and placard requirements of the concession agreement are not preempted.

1. Section 14501(c) preempts only "a law, regulation, or other provision having the force and effect of law." As this Court held in *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995), with respect to the ADA's preemption provision, on which Section 14501(c) was modeled, that language is not naturally read to preempt contractual obligations that motor carriers voluntarily assume. See *id.* at 228-233 & n.5. Rather, the statute's concern is the "the *regulation* of intrastate transportation of property by the States." FAAAA § 601(a), Tit. VI, 108 Stat. 1605 (emphasis added). Ordinary, arms-length commercial agreements between government entities and motor carriers of property thus are not preempted under Section 14501(c).

As explained in this Court's dormant Commerce Clause and implied statutory-preemption cases, however, when a government entity is a counterparty to a commercial agreement, a risk exists that it will exercise essentially regulatory power through the guise of market activity. For that reason, the Court has identified certain principles for determining whether a government entity purporting to act as a market participant is instead acting as a market regulator. The chief inquiry is whether a government entity's actions have the purpose and effect of advancing general reg-

ulatory policies rather than focused proprietary interests, although other considerations are relevant as well.

2. The court of appeals was correct that arms-length agreements in which government-run commercial enterprises limit access to their property could in some circumstances constitute market participation rather than regulation. But four features particular to the Port and the off-street parking and placard requirements at issue here, especially taken together, indicate that they are "tantamount to regulation," *Chamber of Commerce* v. *Brown*, 554 U.S. 60, 70 (2008) (citation omitted), and are therefore preempted. First, the requirement that drayage-service providers enter into a concession agreement to gain access to the Port's facilities is punishable by criminal sanctions. Second, a container port, which furnishes access to interstate and foreign commerce and is typically publicly owned, is far more akin to a public highway or other infrastructure than a commercial enterprise. Third, the particular requirements at issue have a regulatory character because they are generally applicable, concern quintessential functions of government, and lack a concrete commercial justification. Finally, the Port does not otherwise directly contract with drayage-service providers or participate in that market.

B. The court of appeals erred in holding that *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954), is altogether inapplicable here, but it is unclear whether the Port's enforcement of the requirements that petitioner challenges would contravene that decision.

1. Under *Castle*, even if a state law falls within an exception to Section 14501(c), the State may not pun-

ish past violations of the law by restricting the offending motor carrier's rates, routes, or services or otherwise curtailing its federal authorization to operate. Nothing in *Castle* suggests, however, that a State must allow vehicles that are not in compliance with valid state laws, including safety regulations, to operate on its highways or gain access to its other transportation infrastructure.

2. The court of appeals incorrectly concluded that *Castle* is inapplicable here because enforcement of the concession agreement would bar access only to the Port, not to all of a State's highways. *Castle*, however, does not prevent the Port from barring a motor carrier's vehicles from gaining access if they are not in compliance with any non-preempted requirements set forth in the concession agreement. By contrast, *Castle* would prohibit the Port from barring access for a *past*, cured infraction. It is unclear from the concession agreement whether the Port would punish violations of the requirements at issue here through that sanction. The appropriate course is therefore to remand to the court of appeals for further development of that issue. In any event, *Castle* would support only a holding that cured breaches of the non-preempted requirements may not be punished through suspension of a motor carrier's right to gain access to the Port.

ARGUMENT

A. The Court Of Appeals Erred In Holding That The Off-Street Parking And Placard Requirements Are Not Preempted Because They Lack "The Force And Effect Of Law."

The court of appeals held that the Port acted as a market participant in adopting the off-street parking

and placard requirements and that those requirements therefore lack "the force and effect of law" within the meaning of Section 14501(c). See Pet. App. 16a, 38a-41a, 44a-46a. Because that determination was erroneous, this Court should reverse the holding below that those two requirements are not preempted.[1]

1. a. Section 14501(c) preempts only "a law, regulation, or other provision having the force and effect of law." When a challenged requirement is imposed on a motor carrier through an exercise of the regulatory power of a state or local government, such as through an ordinance restricting services that motor carriers may offer or a regulation setting rates, that prerequisite to preemption is readily satisfied. See, *e.g.*, *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008) (statute); *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 428 (2002) (city regulations). Government entities, however, also sometimes act through arms-length commercial contracts with private actors that impose enforceable obligations on both parties. For example, state agencies enter into contracts to procure goods or services, see

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[1] The analysis set forth in this section applies not only to Section 14501(c), but also in large measure to Section 14506(a), which the court of appeals analyzed in connection with the placard requirement and which also uses the phrase "force and effect of law."

Respondents did not contest in their brief in opposition to the certiorari petition the court of appeals' conclusion that the placard requirement would be preempted by Section 14506(a) if it had the "force and effect of law." Pet. App. 46a. Nor did they challenge on appeal the district court's conclusion that the off-street parking provision meets the other requirements for preemption under Section 14501(c). See *id.* at 38a-39a.

Chamber of Commerce v. *Brown*, 554 U.S. 60, 70 (2008), and state-owned commercial enterprises contract with private entities as part of their production and sale of goods, see *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 440 (1980).

Section 14501(c) is not naturally read to preempt contractual arrangements between government entities and motor carriers that do not differ from what private parties might agree to in the free market. As Congress's express findings explain, the provision was intended to preempt the "*regulation* of intrastate transportation of property by the States." FAAAA § 601(a), Tit. VI, 108 Stat. 1605 (emphasis added). The "[t]ypical forms of regulation" of motor carriers are "entry controls, tariff filing and price regulations, and [restrictions on the] types of commodities carried," 1994 Conference Report 86, not arms-length contracts. Although a contractual provision can be enforced in court, and so in that sense could be said to have "the force and effect of law," it differs fundamentally from "regulation" in that it does not represent an exercise of the government's coercive power over private parties.

That was the conclusion this Court reached in *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995), which held that the ADA's similarly worded preemption provision, 49 U.S.C. 41713(b)(1), on which Section 14501(c) was modeled, did not bar "court enforcement of contract terms set by the parties themselves"—there, airlines and their passengers. 513 U.S. at 222; see *id.* at 228-233. Adopting the view of the United States, the Court held that "the word series 'law, rule, regulation, standard, or other provision * * * connotes official, *government-imposed* poli-

cies, not the terms of a private contract.'" *Id.* at 229 n.5 (emphasis added). "A remedy confined to a contract's terms," the Court explained, "simply holds parties to their agreements." *Id.* at 229.

As with the ADA provision, Section 14501(c)'s "ban on enacting or enforcing any law 'relat[ed] to [a price], route[], or service[]' is most naturally read, in light of [its] deregulatory purpose, to mean 'States may not seek to *impose* their own public policies or theories of competition on the operations of a[] [motor] carrier.'" *Wolens*, 513 U.S. at 229 n.5 (emphasis added). That does not occur when a motor carrier voluntarily assumes a contractual obligation, whether the counterparty is a private actor or a government entity. A commercial arrangement between a state or local government acting as a market participant and a motor carrier "does not 'regulate' the workings of the market forces that Congress expected to find; it exemplifies them." *Building & Constr. Trades Council* v. *Associated Builders & Contractors of Mass.*, 507 U.S. 218, 233 (1993) (*Boston Harbor*) (citation omitted).

To be sure, when a government entity is a counterparty to a commercial agreement, a risk exists that it will exercise essentially regulatory power through the guise of a contract. For that reason, this Court, in its dormant Commerce Clause and implied statutory preemption cases, has developed a set of principles for determining whether a government entity purporting to act as a market participant is instead acting as a market regulator. See pp. 19-21, *infra*.

This case involves express, not implied, preemption. Nonetheless, interpreting Section 14501(c) to preempt *all* contractual duties to a government entity that a motor carrier undertakes would expand its

scope beyond what Congress could have envisioned. Government agencies enter into many contracts with motor carriers that are "related to a price, route, or service"—for example, a contract with a trucking company to transport goods at a specified price. See *Defer No More: The Need to Repeal the 3% Withholding Provision: Hearing Before the House Subcomm. on Contracting and Workforce*, 112th Cong., 1st Sess. 116 (2011) (Statement of the American Trucking Ass'ns) ("Not only are private sector consumers dependent on trucks to deliver and ship their goods, but so are public entities at the federal, state and local government level."). It would be absurd to conclude that all terms relating to a price, route, or service agreed to in such contracts are preempted by Section 14501(c), and nothing in the statute's deregulatory objectives or legislative history suggests that it was intended to interfere with government contracting decisions or to render such contracts unenforceable. The court of appeals was thus correct in concluding that Section 14501(c) "preempt[s] only [S]tate regulation," not "direct [S]tate participation in the market." Pet. App. 21a (brackets in original; citations omitted).

b. Petitioner contends (Br. 26-28) that express proprietary exceptions to other preemption statutes demonstrate that Congress intended Section 14501(c) to preempt actions taken by a government entity in the role of a market participant. It principally relies on a subsection of the ADA's preemption provision stating that it "does not limit a State [or locality] * * * that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights." 49 U.S.C. 41713(b)(3) (em-

phasis added). As originally enacted, that subsection stated that "[n]othing in [the preemption provision] *shall be construed* to limit the authority of any State or political subdivision thereof * * * as the owner or operator of an airport * * * to exercise its proprietary powers and rights." ADA § 4, 92 Stat. 1707-1708 (49 U.S.C. App. 1305(b)(1) (1992)) (emphasis added). That language was amended and relocated in 1994 as part of a statute intended to revise Title 49 "without substantive change." Act of July 5, 1994, Pub. L. No. 103-272, §§ 1(a), 1(e), 108 Stat. 745, 1143; see *id.* § 6(a), 108 Stat. 1378 ("Those sections may not be construed as making a substantive change in the laws replaced."); *CSX Transp., Inc.* v. *Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1105 n.1 (2011). The airport provision thus serves to ensure that the ADA's preemption provision will not be construed to oust certain traditional proprietary activities of a municipal airport affecting air carriers that might otherwise have been viewed as more regulatory than commercial in character.[2] The absence of a comparable provision in Section 14501(c) does not suggest that *no* proprietary functions of a state or local government are saved from preemption—*i.e.*, that Section 14501(c)'s re-

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[2] It should be noted that the Secretary of Transportation has significant authority over the operation of commercial airports, including with respect to fees and gate privileges. See, *e.g.*, 49 U.S.C. 47129, 47107.

The interpretation of the airport provision set forth above comports with this Court's observation in *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992), that the provision would have been unnecessary if the ADA's "relating to" standard were interpreted narrowly to preempt States only "from actually prescribing rates, routes, or services." *Id.* at 385-386.

quirement that a challenged act have "the force and effect of law" includes even indisputably commercial activities like contracts for shipments of property entered into by government entities acting as market participants.

The other statutes that petitioner cites do not use the phrase "force and effect of law," were not models for Section 14501(c), and have obvious reasons for specifying a proprietary exception. For example, petitioner cites a provision prohibiting a State or political subdivision from prescribing vehicle safety standards "applicable to the same aspect of performance" as a federal standard, but permitting a State or political subdivision to set more stringent standards for vehicles obtained for its own use. 49 U.S.C. 30103(b)(1). Unlike Section 14501(c), that provision addresses the reach of federal safety regulations that, in the absence of the exception, might have been read to apply to state proprietary action. The other cited provisions have the same structure. See 15 U.S.C. 1203(b), 1476(b), 2075(b); 49 U.S.C. 32304(i)(2), 32919(c).

2. a. Although an ordinary commercial contract is not preempted by Section 14501(c), this Court has recognized that government entities sometimes exercise regulatory power through contractual arrangements. See *Boston Harbor*, 507 U.S. at 226-228. Because the "government occupies a unique position of power in our society," *Wisconsin Department of Industry, Labor & Human Relations* v. *Gould, Inc.*, 475 U.S. 282, 290 (1986), it can engage in ostensibly commercial activity that "for all practical purposes * * * [is] tantamount to regulation," *Brown*, 554 U.S. at 69 (citation omitted).

This Court has accordingly set forth principles elucidating "the basic distinction between government as regulator and government as proprietor" in cases involving constitutional or statutory preemption. *Boston Harbor*, 507 U.S. at 227. Although those cases did not interpret a statutory phrase such as "force and effect of law," their analysis is relevant because, for the reasons set forth above, Section 14501(c) preempts regulation but not commercial activity. The chief inquiry is whether a government entity's actions, even if otherwise commercial, have the purpose and effect of advancing general regulatory policies rather than focused proprietary interests. Thus, for example, in *Gould* this Court held that a Wisconsin statute barring repeat violators of the National Labor Relations Act from doing business with the State was preempted. See 475 U.S. at 283. The "manifest purpose and inevitable effect" of the statute, the Court reasoned, was "to enforce the requirements of the NLRA," rather than to respond "to state procurement constraints or to local economic needs." *Id.* at 291.

In determining whether government action taking the form of commercial activity should be regarded in substance as regulatory, the Court has also considered whether the challenged action is "specifically tailored to one particular job," *Brown*, 554 U.S. at 70 (citation omitted); whether it represents an attempt to affect the behavior of all businesses that are impacted by its "economic ripple effect," *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 211 (1983) (citation omitted); and whether the government entity is "burdened with the same restrictions imposed on private market participants," *Reeves*, 447 U.S. at 439. In addition, a government en-

tity "acts as a market regulator when it employs tools in pursuit of compliance that no private actor could wield, such as the threat of civil fines, criminal fines and incarceration." *United Haulers Ass'n* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 438 F.3d 150, 157 (2d Cir. 2006), aff'd, 550 U.S. 330 (2007).

b. The off-street parking and placard requirements that petitioner challenges are imposed through concession agreements that the court of appeals described as "contracts under which the Port exchanges access to its property for a drayage carrier's compliance with certain conditions." Pet. App. 25a. In some circumstances, property-access agreements could represent market activity by a government-run commercial operation and therefore lack "the force and effect of law." For example, a government-owned factory, see *Reeves*, 447 U.S. at 430-431, presumably could enter into contracts with trucking companies establishing the conditions under which they may enter its premises to pick up goods and deliver supplies. As this Court explained in *Boston Harbor*, the government does not engage in "regulation" when it merely "manages property" by "interact[ing] with private participants in the marketplace," and "[i]n the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, * * * this Court will not infer such a restriction." 507 U.S. at 227, 231-232. Even petitioner agrees (Br. 30) that a State can act as a market participant when it manages "state-allocated funds," and there is no reason why the same cannot be true with respect to the management of real property. The mere fact that restrictions are prompted in part by environmental concerns,

moreover, does not categorically render them regulatory in character. See *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 809 (1976). Numerous Fortune 500 companies have launched "green" initiatives. See NRDC Br. in Opp. 18-20.

But four considerations particular to the Port and to the requirements challenged here, especially taken together, establish that they have been imposed by the Port in a regulatory capacity and therefore have "the force and effect of law."

First, the Port's demand that drayage-service providers enter into a concession agreement is incorporated into a tariff that is "penally enforceable." Pet. App. 83a n.5. The tariff states that "no Terminal Operator shall permit access into any Terminal in the Port of Los Angeles to any Drayage Truck unless such Drayage Truck is registered under a Concession or a Day Pass." J.A. 105. It further warns that each day the violation persists constitutes a separate misdemeanor offense punishable by up to six months in prison. J.A. 85. Unlike what an ordinary private participant in the marketplace could do, therefore, the requirement that drayage-service providers operating on its facilities enter into a standard-form concession agreement is enforced with the threat of special criminal penalties (although it is not clear that a breach of the agreement would constitute a crime). Any common-sense understanding of the term "force and effect of law" is satisfied by a requirement backed by "criminal penalties which only a state and not a mere proprietor can enforce." *Washington State Bldg. & Constr. Trades Council* v. *Spellman*, 684 F.2d 627, 631 (9th Cir. 1982), cert. denied, 461 U.S. 913 (1983).

Second, a container port is far more akin to publicly managed transportation infrastructure, like a highway or a bridge, than to an ordinary commercial operation. The largest container ports in the Nation are owned and administered by public agencies. See Eno Ctr. for Transp., *Intermodal Transportation: Moving Freight In A Global Economy* 284 (2010) ("[P]ublic ownership is a key feature of the US port network."); U.S. Dep't of Transportation, Bureau of Transp. Statistics, *America's Container Ports: Linking Markets at Home and Abroad* 6 (2011) (listing twenty largest container ports); see also 4/27/10 Trial Tr. 64-65, 2:08-cv-04920 Docket entry No. 337 (C.D. Cal. Jan. 14, 2011) ("The port has its own police force."). And like an ordinary highway, a container port furnishes access to channels of interstate and international trade. For that reason, the concession agreement resembles a license more than an arms-length commercial contract. Although the Port faces competition from other public ports, Pet. App. 73a, it is common for regulatory agencies, such as agencies overseeing industrial development, to compete in this sense with counterpart agencies of other governments to attract investment to their region.

Third, the off-street parking and placard requirements that the Ninth Circuit upheld on market-participant grounds are more regulatory than commercial in character. They are both provisions of general applicability insofar as they govern on a permanent basis all drayage-service providers that wish to gain access to the Port, and they each concern quintessential functions of government (parking restrictions and vehicle identification). Neither requirement is "specifically tailored to one particular [transac-

tion]," nor are they responsive "to state procurement constraints or to local economic needs" or other concrete commercial objectives. *Brown*, 554 U.S. at 70 (citation omitted); see also Pet. App. 23a. Rather, as the district court found, they "were designed specifically to generate goodwill among local residents and to minimize exposure to litigation from them." *Id.* at 127a; see also *id.* at 40a, 46a. Although the court of appeals was correct that "[e]nhancing good-will in the community" can be an "objectively reasonable business interest," *id.* at 40a, a government entity could claim such an interest for even the most thinly veiled regulatory action. Unlike restrictions aimed at ensuring the completion of specific commercial objectives "as quickly and effectively as possible at the lowest cost," *Boston Harbor*, 507 U.S. at 232, a general interest in public approval does not suffice to establish that a government entity is acting as a market participant.

Finally, the Port does not itself contract with drayage-service providers (apart from the concession agreement itself). See Pet. App. 50a (Smith, J., dissenting in part). Standing alone, that fact might not preclude a market-participant finding. It is conceivable that a government entity managing access to its property may act as a market participant even if it does not directly participate in the market it seeks to affect. See *White*, 460 U.S. at 211 n.7 (explaining that market participation does not "stop at the boundary of formal privity of contract," but that "there are some [Commerce Clause] limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business"). A state-owned sports arena, for example, might impose some restrictions on trucks

entering its premises to deliver supplies to food vendors leasing the facilities, even though the arena does not directly contract with trucking companies or participate in the food-service industry. But a more attenuated relationship between the government entity and the motor carrier calls for a substantial commercial justification to dispel the inference that the government entity is "using its leverage in [one] market to exert a regulatory effect in [another] market." *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 98 (1984) (opinion of White, J.). For the reasons discussed above, such a compelling business interest has not been demonstrated here with respect to the two challenged requirements.

Accordingly, the off-street parking and placard requirements have "the force and effect of law" and are therefore preempted.

B. The Court Of Appeals Erred In Holding That *Castle* Is Altogether Inapplicable Here

Petitioner argues (Br. 40) that this Court's decision in *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954), bars the Port from denying access to motor carriers for violation of concession-agreement requirements that are not preempted. As explained above, see pp. 22-25, *supra*, the placard and off-street parking requirements of the agreement are preempted, so the question whether the Port could deny access for violation of those requirements does not arise. That question therefore arises only in connection with the financial-capability and maintenance requirements, which, in this case as now presented, are not preempted. The court of appeals held that the financial-capability requirement is not preempted because it is not "related to a price, route, or service of any

motor carrier," see Pet. App. 33a-34a, and the Court did not grant certiorari on Question 2 in the petition, which sought review of that holding. And petitioner did not seek review of the court of appeals' holding that the maintenance requirement falls within the safety exception to preemption under Section 14501(c)(2)(A). See Pet. App. 34a-38a.

In addressing the application of *Castle*, it is important to distinguish between two different aspects of the concession agreement's enforcement scheme: (i) the authority of the Port to bar *non-compliant* trucks from its premises, and (ii) its authority to punish motor carriers for *past*, cured breaches through suspension or revocation of the agreement. A challenge to the first would fail under *Castle*, but it does not appear that petitioner now contests the authority of the Port to bar trucks that do not comply with non-preempted requirements of the concession agreement. A challenge to the second type of enforcement would succeed under *Castle*, but it is not clear that the Port intends to exercise its authority in that manner.

1. A number of this Court's decisions between the enactment of the Motor Carrier Act in 1935 and the *Castle* decision in 1954 made clear that States retained ample authority to enact and enforce safety regulations. See pp. 2-3, *supra*. In *Maurer* v. *Hamilton*, 309 U.S. 598 (1940), the Court upheld the application to interstate carriers of a Pennsylvania statute providing that "[n]o person shall operate a vehicle on the highways of this Commonwealth carrying any other vehicle" in specified ways. *Id.* at 599-600 & n.1 (quoting statute). The Court interpreted the Motor Carrier Act not to alter "[t]he power of the states to regulate the sizes and weights of loaded motor vehicles" and

therefore held that the statute was not preempted. *Id.* at 610, 617. Because the Pennsylvania regulation was valid, the Court evidently saw no problem with the fact that "enforcement of [the provision] would deprive [the motor carriers] of the use of their property in that they * * * cannot feasibly reroute their traffic so as to avoid traveling through the State." U.S. and ICC Amicus Br. at 5, *Maurer*, *supra* (No. 380).

Castle applied the holding of *Maurer* to conclude that Illinois' limits on "the weight of freight that can be carried in commercial trucks over Illinois highways" were not preempted. 348 U.S. at 62, 64. But the Court went on to hold that a provision of the Illinois statute punishing repeated violations by prohibiting the carrier from using state highways for up to one year for interstate transit was preempted. See *id.* at 63-64. The Court reasoned that the Motor Carrier Act vested the ICC with exclusive authority to determine if a carrier could operate in interstate commerce and imposed significant procedural requirements before the ICC could suspend or revoke a carrier's authorization, so "it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate." *Id.* at 64. The Court deemed "suspension of this common carrier's right to use Illinois highways * * * the equivalent of a partial suspension of its federally granted certificate" insofar as it excluded the carrier from a portion of the Nation's highways for an extended period of time, "seriously disrupt[ing]" its "carriage of interstate goods into Illinois and other states." *Ibid.* The decision made clear, however, that States could enforce non-preempted

regulations through more "conventional forms of punishment." *Ibid.*[3]

Castle thus stands for the proposition that even where a State seeks to enforce non-preempted requirements against federally licensed motor carriers, the enforcement mechanism chosen by the State may conflict with federal law. In particular, a partial suspension of the carrier's right to operate in the manner permitted by its federal registration as punishment for a past infraction of state law is preempted by the federal licensing scheme—a scheme that still exists, in heavily deregulated form, today.

By contrast, neither the Court nor any party in *Castle* suggested that a State must allow vehicles that are out of compliance with safety regulations or other non-preempted laws to continue to operate on its highways. The motor carrier in *Castle* framed the issue as "the denial of the use of state highways to interstate motor carriers as a sanction for *prior* violation of state law" and acknowledged that a State may "stop and prevent from continuing on the highway any motor vehicle which it finds not to be in compliance." Resp. Br. at 4-5, 23, *Castle*, *supra* (No. 44) (emphasis added). And petitioner explained in an amicus curiae brief that "[t]he vehicle itself that fails to comply with the state's regulations may be barred from the state's highways." American Trucking Ass'ns Amicus Br. at 12, *Castle*, *supra* (No. 44) (citations omitted).

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[3] In *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171 (1959), this Court cited *Castle* for the proposition that Virginia could not impose criminal fines on a federally licensed motor carrier, but in that case the State was not exercising non-preempted authority. See *id.* at 179.

As applied to the modern statutory regime for motor carriers, *Castle* teaches that even if a state law is not preempted because it falls within an exception to Section 14501(c), the method the State chooses to punish violations of the law might be independently preempted by that provision or due to a conflict with the federal licensing scheme. For example, Section 14501(c) does "not restrict the safety regulatory authority of a State with respect to motor vehicles," 49 U.S.C. 14501(c)(2)(A), and thus state and local governments generally may enact motor-carrier regulations that are "genuinely responsive to safety concerns." *City of Columbus*, 536 U.S. at 442.[4] But punishing past safety infractions through a restriction on the services that a carrier may offer or the routes that it may serve in the future—rather than through "more conventional means of punishment" like fines or imprisonment—would be preempted. See also 1994 Conference Report 84 ("The conferees do not intend for States to attempt to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority."). Nothing in *Castle*, however, supports the view that a State is required to allow unsafe vehicles to use its highways or gain access to its other transportation infrastructure.

2. Under the reasoning of *Castle*, petitioner is correct that the Port may not punish past breaches of non-preempted requirements of the concession agreement by denying a carrier the ability to gain access to its premises and provide drayage services

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[4] Notwithstanding this general state authority, the Secretary of Transportation may preempt state safety laws and regulations in certain instances. See 49 U.S.C. 31141.

there. The court of appeals erred in distinguishing *Castle* on the ground that it involved "all of a State's freeways" rather than "access to a single Port." Pet. App. 32a. A major container port is an important gateway to interstate and international commerce, and in any event barring access would plainly restrict a carrier's routes and services within the meaning of Section 14501(c).

As relevant here, however, the concession agreement's actual enforcement scheme does not necessarily contravene *Castle*. The Port has conditioned access to its facilities on a carrier's registration under the concession agreement (or attainment of a day pass). See Pet. App. 12a; J.A. 105. The Port has also reserved the authority to require that a drayage-service provider cure any default within a reasonable time. J.A. 73. If the carrier does not timely comply with an order to cure the default, the Port could bar it from entering its premises. See J.A. 73, 82-83.

At the certiorari stage, petitioner appeared principally to challenge this aspect of the enforcement scheme. See Pet. Supp. Br. 10 (arguing that provision permitting Port to bar access "in the event of a default not timely cured * * * cannot be reconciled with *Castle*'s holding"); see also Pet. 4, 6-8, 26, 33. Petitioner continues to cite (Br. 38) these provisions as encompassed within its *Castle* challenge. But as explained above, prohibiting a carrier's truck from gaining access to Port facilities until it is brought into compliance with non-preempted regulations is fully consistent with *Castle*. Congress would not have intended that the Port be powerless to bar trucks that have not complied with valid safety requirements from gaining access to its facilities until the problems—

faulty brakes, for example, or blown headlights—are fixed. Likewise, given Section 14501(c)'s exception for "the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements," 49 U.S.C. 14501(c)(2)(A), the Port would be under no federal obligation to allow a carrier to bring its trucks onto the Port's premises if the carrier has not obtained the requisite level of insurance. See J.A. 63-69 (concession agreement's insurance requirements).

Petitioner concedes (Br. 40), in fact, that *Castle* permits a state or local government to "tak[e] out of service a truck that does not meet a state or local safety regulation." If only a single truck were out of compliance with a non-preempted requirement of the concession agreement, presumably the carrier could cure the default by simply "taking the truck out of service" itself until the problem is fixed. Cf. Resp. Br. at 15, *Castle*, *supra* (No. 44) (arguing that suspension "cannot be complied with in any way except by complete cessation of operations during the period of suspension"). Nothing in the agreement suggests that the Port would not accept that as a cure, and *Castle* would require it to do so.

Petitioner is correct (Br. 38, 40-41) that barring access to the Port's facilities as a penalty for a *past*, cured breach of the concession agreement would be preempted under the reasoning of *Castle*. But although the concession agreement contains provisions authorizing penalties for breach, the penalties for a "Minor Default" do not include suspension or revocation of the drayage-service provider's right to use the Port. J.A. 81-82. Because the agreement does not define what constitutes a "Major Default," it is not clear

whether the Port would deem a cured breach of the financial-capability or maintenance requirements to warrant suspension or revocation.[5]

The court of appeals, in fact, expressly determined that the Port would not enforce the financial-capability requirement by denying access to its facilities. See Pet. App. 34a. In addition, the Port's Director of Operations testified that "something egregious would have to happen" for the default provisions to be invoked at all, 4/23/10 Trial Tr. 51, 120, 2:08-cv-04920 Docket entry No. 336 (C.D. Cal. Jan. 14, 2011), and its expert witness testified that the authority to terminate a concession agreement was designed to be "the ultimate tool if someone continues to be *noncompliant* and threatens the port environment," 4/28/10 Trial Tr. 86, 2:08-cv-04920 Docket entry No. 338 (C.D. Cal. Jan. 14, 2011) (emphasis added). In its arguments before the court of appeals, the Port maintained only that it could "prohibit a non-compliant drayage truck from entering Port property," not that it could use suspension or revocation as a form of punishment for past violations of the requirements that petitioner has challenged. Intervenor-Appellee C.A. Br. at 38-39; see Appellee C.A. Br. at 57 (adopting intervenor's arguments).

Given the uncertainty over whether the Port claims the authority to punish past, cured violations of the requirements challenged here through suspension or revocation, the most appropriate course is to remand to the courts below for determination of that question

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[5] It is similarly unclear whether, if this Court were to hold that the placard and off-street parking requirements are not preempted, the Port would regard a violation of either of those requirements as a Major Default.

in the first instance in light of a proper understanding of *Castle*.[6] If the Court chooses to reach the issue, however, it should hold that under *Castle*, the Port may not punish past violations of non-preempted requirements through suspension or termination of access to the Port. See J.A. 54 (concession agreement's severability clause). But *Castle* does not provide an independent basis to challenge the substance of such requirements or curtail the Port's authority to bar access to non-compliant motor carriers.

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[6] Petitioner contends (Br. 40) that this Court's decisions in *City of Chicago* v. *Atchinson, T. & S. F. Railway*, 357 U.S. 77 (1958), and *Railroad Transfer Service* v. *City of Chicago*, 386 U.S. 351 (1967), require that its *Castle* challenge be heard at this time even if the Port does not assert the authority to suspend or revoke a carrier's access for cured breaches of the financial-capability and maintenance requirements. In those cases, this Court held that Chicago's licensing scheme for a railway transfer company was preempted by the Interstate Commerce Act, 49 Cong. Ch. 104, 24 Stat. 379. See *Railroad Transfer*, 386 U.S. at 353, 360. In the first case, the Court found the controversy ripe because the applicability of the licensing scheme was clear. 357 U.S. at 84. In *Railroad Transfer*, in permitting the company to challenge the scheme before the denial of a license, the Court found that the city had asserted the authority to deny the company a license and had "not give[n] up its power under [its] ordinance to fine [the company] and arrest its drivers for operating without licenses or its power to revoke for discretionary reasons all licenses which [the company] may obtain." 386 U.S. at 357-358. The Court explained that "the City [sought] to enforce *each and all* of [its scheme's] related requirements," such as financial-disclosure requirements, "by denial of a license and then criminal sanctions for operation without a license." *Id.* at 360 (emphasis added). Here, by contrast, it is not apparent that "the Port claims the authority to suspend or revoke a motor carrier's access to the Port" to punish a past, cured breach of the challenged requirements. Pet. Br. 40 (emphasis omitted).

CONCLUSION

The judgment of the court of appeals should be reversed. With respect to the financial-capability and maintenance requirements, the case should be remanded for further consideration.

Respectfully submitted.

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APPENDIX

1. The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. 49 U.S.C. 13102 (2006 & Supp. III 2011) provides:

Definitions

> In this part, the following definitions shall apply:
>
> (1) BOARD.—The term "Board" means the Surface Transportation Board.
>
> (2) BROKER.—The term "broker" means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.
>
> (3) CARRIER.—The term "carrier" means a motor carrier, a water carrier, and a freight forwarder.

(4) CONTRACT CARRIAGE.—The term "contract carriage" means—

(A) for transportation provided before January 1, 1996, service provided pursuant to a permit issued under section 10923, as in effect on December 31, 1995; and

(B) for transportation provided after December 31, 1995, service provided under an agreement entered into under section 14101(b).

(5) CONTROL.—The term "control", when referring to a relationship between persons, includes actual control, legal control, and the power to exercise control, through or by—

(A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or

(B) any other means.

(6) FOREIGN MOTOR CARRIER.—The term "foreign motor carrier" means a person (including a motor carrier of property but excluding a motor private carrier)—

(A)(i) that is domiciled in a contiguous foreign country; or

(ii) that is owned or controlled by persons of a contiguous foreign country; and

(B) in the case of a person that is not a motor private carrier, that provides interstate transportation of property by motor vehicle under an agreement or contract entered into with a person (other than a motor carrier of property or

motor private carrier described in subparagraph (A)).

(7) FOREIGN MOTOR PRIVATE CARRIER.—The term "foreign motor private carrier" means a person (including a motor private carrier but excluding a motor carrier of property)—

(A)(i) that is domiciled in a contiguous foreign country; or

(ii) that is owned or controlled by persons of a contiguous foreign country; and

(B) in the case of a person that is not a motor private carrier, that provides interstate transportation of property by motor vehicle under an agreement or contract entered into with a person (other than a motor carrier of property or a motor private carrier described in subparagraph (A)).

(8) FREIGHT FORWARDER.—The term "freight forwarder" means a person holding itself out to the general public (other than as a pipeline, rail, motor, or water carrier) to provide transportation of property for compensation and in the ordinary course of its business—

(A) assembles and consolidates, or provides for assembling and consolidating, shipments and performs or provides for break-bulk and distribution operations of the shipments;

(B) assumes responsibility for the transportation from the place of receipt to the place of destination; and

(C) uses for any part of the transportation a carrier subject to jurisdiction under this subtitle.

The term does not include a person using transportation of an air carrier subject to part A of subtitle VII.

(9) HIGHWAY.—The term "highway" means a road, highway, street, and way in a State.

(10) HOUSEHOLD GOODS.—The term "household goods", as used in connection with transportation, means personal effects and property used or to be used in a dwelling, when a part of the equipment or supply of such dwelling, and similar property if the transportation of such effects or property is—

(A) arranged and paid for by the householder, except such term does not include property moving from a factory or store, other than property that the householder has purchased with the intent to use in his or her dwelling and is transported at the request of, and the transportation charges are paid to the carrier by, the householder; or

(B) arranged and paid for by another party.

(11) HOUSEHOLD GOODS FREIGHT FORWARDER —The term "household goods freight forwarder" means a freight forwarder of one or more of the following items: household goods, unaccompanied baggage, or used automobiles.

(12) HOUSEHOLD GOODS MOTOR CARRIER.—

(A) In general.—The term "household goods motor carrier" means a motor carrier that, in

the ordinary course of its business of providing transportation of household goods, offers some or all of the following additional services:

(i) Binding and nonbinding estimates.

(ii) Inventorying.

(iii) Protective packing and unpacking of individual items at personal residences.

(iv) Loading and unloading at personal residences.

(B) INCLUSION.—The term includes any person that is considered to be a household goods motor carrier under regulations, determinations, and decisions of the Federal Motor Carrier Safety Administration that are in effect on the date of enactment of the Household Goods Mover Oversight Enforcement and Reform Act of 2005.

(C) LIMITED SERVICE EXCLUSION.—The term does not include a motor carrier when the motor carrier provides transportation of household goods in containers or trailers that are entirely loaded and unloaded by an individual (other than an employee or agent of the motor carrier).

(13) INDIVIDUAL SHIPPER.—The term "individual shipper" means any person who—

(A) is the shipper, consignor, or consignee of a household goods shipment;

(B) is identified as the shipper, consignor, or consignee on the face of the bill of lading;

(C) owns the goods being transported; and

(D) pays his or her own tariff transportation charges.

(14) MOTOR CARRIER.—The term "motor carrier" means a person providing motor vehicle transportation for compensation.

(15) MOTOR PRIVATE CARRIER.—The term "motor private carrier" means a person, other than a motor carrier, transporting property by motor vehicle when—

(A) the transportation is as provided in section 13501 of this title;

(B) the person is the owner, lessee, or bailee of the property being transported; and

(C) the property is being transported for sale, lease, rent, or bailment or to further a commercial enterprise.

(16) MOTOR VEHICLE.—The term "motor vehicle" means a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway in transportation, or a combination determined by the Secretary, but does not include a vehicle, locomotive, or car operated only on a rail, or a trolley bus operated by electric power from a fixed overhead wire, and providing local passenger transportation similar to street-railway service.

(17) NONCONTIGUOUS DOMESTIC TRADE.—The term "noncontiguous domestic trade" means transportation subject to jurisdiction under chapter 135

involving traffic originating in or destined to Alaska, Hawaii, or a territory or possession of the United States.

(18) PERSON.—The term "person", in addition to its meaning under section 1 of title 1, includes a trustee, receiver, assignee, or personal representative of a person.

(19) PRE-ARRANGED GROUND TRANSPORTATION SERVICE.—The term "pre-arranged ground transportation service" means transportation for a passenger (or a group of passengers) that is arranged in advance (or is operated on a regular route or between specified points) and is provided in a motor vehicle with a seating capacity not exceeding 15 passengers (including the driver).

(20) SECRETARY.—The term "Secretary" means the Secretary of Transportation.

(21) STATE.—The term "State" means the 50 States of the United States and the District of Columbia.

(22) TAXICAB SERVICE.—The term "taxicab service" means passenger transportation in a motor vehicle having a capacity of not more than 8 passengers (including the driver), not operated on a regular route or between specified places, and that—

(A) is licensed as a taxicab by a State or a local jurisdiction; or

(B) is offered by a person that—

(i) provides local transportation for a fare determined (except with respect to transportation to or from airports) primarily on the basis of the distance traveled; and

(ii) does not primarily provide transportation to or from airports.

(23) TRANSPORTATION.—The term "transportation" includes—

(A) a motor vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property.

(24) UNITED STATES.—The term "United States" means the States of the United States and the District of Columbia.

(25) VESSEL.—The term "vessel" means a watercraft or other artificial contrivance that is used, is capable of being used, or is intended to be used, as a means of transportation by water.

(26) WATER CARRIER.—The term "water carrier" means a person providing water transportation for compensation.

(27) OVER-THE-ROAD BUS.—The term "over-the-road bus" means a bus characterized by an elevated passenger deck located over a baggage compartment.

3. 49 U.S.C. 13501 provides:

General jurisdiction

The Secretary and the Board have jurisdiction, as specified in this part, over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier—

(1) between a place in—

(A) a State and a place in another State;

(B) a State and another place in the same State through another State;

(C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;

(D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) the United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

4. 49 U.S.C. 13901 provides:

Requirements for registration

A person may provide transportation or service subject to jurisdiction under subchapter I or III of chapter 135 or be a broker for transportation subject to jurisdiction under subchapter I of that chapter, only if the person is registered under this chapter to provide the transportation or service.

5. 49 U.S.C. 13902 (2006 & Supp. V 2011) provides:

Registration of motor carriers

(a) MOTOR CARRIER GENERALLY.—

(1) IN GENERAL.—Except as provided in this section, the Secretary shall register a person to provide transportation subject to jurisdiction under subchapter I of chapter 135 of this title as a motor carrier if the Secretary finds that the person is willing and able to comply with—

(A) this part and the applicable regulations of the Secretary and the Board;

(B)(i) any safety regulations imposed by the Secretary;

(ii) the duties of employers and employees established by the Secretary under section 31135; and

(iii) the safety fitness requirements established by the Secretary under section 31144;

(C) the accessibility requirements established by the Secretary under subpart H of part 37 of title 49, Code of Federal Regulations, or such successor regulations to those accessibility requirements as the Secretary may issue, for transportation provided by an over-the-road bus; and

(D) the minimum financial responsibility requirements established by the Secretary under sections 13906, 31138.

(2) ADDITIONAL REGISTRATION REQUIREMENTS FOR HOUSEHOLD GOODS MOTOR CARRIERS.—In addition to meeting the requirements of paragraph (1), the Secretary may register a person to provide transportation of household goods as a household goods motor carrier only after that person—

(A) provides evidence of participation in an arbitration program and provides a copy of the notice of the arbitration program as required by section 14708(b)(2);

(B) identifies its tariff and provides a copy of the notice of the availability of that tariff for inspection as required by section 13702(c);

(C) provides evidence that it has access to, has read, is familiar with, and will observe all applicable Federal laws relating to consumer protection, estimating, consumers' rights and responsibilities, and options for limitations of liability for loss and damage; and

(D) discloses any relationship involving common stock, common ownership, common man-

agement, or common familial relationships between that person and any other motor carrier, freight forwarder, or broker of household goods within 3 years of the proposed date of registration.

(3) CONSIDERATION OF EVIDENCE; FINDINGS.—The Secretary shall consider, and to the extent applicable, make findings on any evidence demonstrating that the registrant is unable to comply with any applicable requirement of paragraph (1) or, in the case of a registrant to which paragraph (2) applies, paragraph (1) or (2).

(4) WITHHOLDING.—If the Secretary determines that a registrant under this section does not meet, or is not able to meet, any requirement of paragraph (1) or, in the case of a registrant to which paragraph (2) applies, paragraph (1) or (2), the Secretary shall withhold registration.

(5) LIMITATION ON COMPLAINTS.—The Secretary may hear a complaint from any person concerning a registration under this subsection only on the ground that the registrant fails or will fail to comply with this part, the applicable regulations of the Secretary and the Board (including the accessibility requirements established by the Secretary under subpart H of part 37 of title 49, Code of Federal Regulations, or such successor regulations to those accessibility requirements as the Secretary may issue, for transportation provided by an over-the-road bus), the safety regulations of the Secretary, or the safety fitness or minimum financial responsibility requirements of paragraph (1) of

this subsection. In the case of a registration for the transportation of household goods as a household goods motor carrier, the Secretary may also hear a complaint on the ground that the registrant fails or will fail to comply with the requirements of paragraph (2) of this subsection.

(b) MOTOR CARRIERS OF PASSENGERS.—

(1) REGISTRATION OF PRIVATE RECIPIENTS OF GOVERNMENTAL ASSISTANCE.—The Secretary shall register under subsection (a)(1) a private recipient of governmental assistance to provide special or charter transportation subject to jurisdiction under subchapter I of chapter 135 as a motor carrier of passengers if the Secretary finds that the recipient meets the requirements of subsection (a)(1), unless the Secretary finds, on the basis of evidence presented by any person objecting to the registration, that the transportation to be provided pursuant to the registration is not in the public interest.

(2) REGISTRATION OF PUBLIC RECIPIENTS OF GOVERNMENTAL ASSISTANCE.—

(A) CHARTER TRANSPORTATION.—The Secretary shall register under subsection (a)(1) a public recipient of governmental assistance to provide special or charter transportation subject to jurisdiction under subchapter I of chapter 135 as a motor carrier of passengers if the Secretary finds that—

(i) the recipient meets the requirements of subsection (a)(1); and

(ii)(I) no motor carrier of passengers (other than a motor carrier of passengers which is a public recipient of governmental assistance) is providing, or is willing to provide, the transportation; or

(II) the transportation is to be provided entirely in the area in which the public recipient provides regularly scheduled mass transportation services.

(B) REGULAR-ROUTE TRANSPORTATION.—The Secretary shall register under subsection (a)(1) a public recipient of governmental assistance to provide regular-route transportation subject to jurisdiction under subchapter I of chapter 135 as a motor carrier of passengers if the Secretary finds that the recipient meets the requirements of subsection (a)(1), unless the Secretary finds, on the basis of evidence presented by any person objecting to the registration, that the transportation to be provided pursuant to the registration is not in the public interest.

(C) TREATMENT OF CERTAIN PUBLIC RECIPIENTS.—Any public recipient of governmental assistance which is providing or seeking to provide transportation of passengers subject to jurisdiction under subchapter I of chapter 135 shall, for purposes of this part, be treated as a person which is providing or seeking to provide transportation of passengers subject to such jurisdiction.

(3) INTRASTATE TRANSPORTATION BY INTERSTATE CARRIERS.—A motor carrier of passengers that is registered by the Secretary under subsection (a) is authorized to provide regular-route transportation entirely in one State as a motor carrier of passengers if such intrastate transportation is to be provided on a route over which the carrier provides interstate transportation of passengers.

(4) PREEMPTION OF STATE REGULATION REGARDING CERTAIN SERVICE.—No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to the provision of pickup and delivery of express packages, newspapers, or mail in a commercial zone if the shipment has had or will have a prior or subsequent movement by bus in intrastate commerce and, if a city within the commercial zone, is served by a motor carrier of passengers providing regular-route transportation of passengers subject to jurisdiction under subchapter I of chapter 135.

(5) JURISDICTION OVER CERTAIN INTRASTATE TRANSPORTATION.—Subject to section 14501(a), any intrastate transportation authorized by this subsection shall be treated as transportation subject to jurisdiction under subchapter I of chapter 135 until such time as the carrier takes such action as is necessary to establish under the laws of such State rates, rules, and practices applicable to such transportation, but in no case later than the 30th

day following the date on which the motor carrier of passengers first begins providing transportation entirely in one State under this paragraph.

(6) SPECIAL OPERATIONS.—This subsection shall not apply to any regular-route transportation of passengers provided entirely in one State which is in the nature of a special operation.

(7) SUSPENSION OR REVOCATION.—Intrastate transportation authorized under this subsection may be suspended or revoked by the Secretary under section 13905 of this title at any time.

(8) DEFINITIONS.—In this subsection, the following definitions apply:

(A) PUBLIC RECIPIENT OF GOVERNMENTAL ASSISTANCE.—The term "public recipient of governmental assistance" means—

(i) any State,

(ii) any municipality or other political subdivision of a State,

(iii) any public agency or instrumentality of one or more States and municipalities and political subdivisions of a State,

(iv) any Indian tribe, and

(v) any corporation, board, or other person owned or controlled by any entity described in clause (i), (ii), (iii), or (iv),

which before, on, or after January 1, 1996, received governmental assistance for the purchase or operation of any bus.

(B) PRIVATE RECIPIENT OF GOVERNMENT ASSISTANCE.—The term "private recipient of government assistance" means any person (other than a person described in subparagraph (A)) who before, on, or after January 1, 1996, received governmental financial assistance in the form of a subsidy for the purchase, lease, or operation of any bus.

(c) RESTRICTIONS ON MOTOR CARRIERS DOMICILED IN OR OWNED OR CONTROLLED BY NATIONALS OF A CONTIGUOUS FOREIGN COUNTRY.—

(1) PREVENTION OF DISCRIMINATORY PRACTICES.—If the President, or the delegate thereof, determines that an act, policy, or practice of a foreign country contiguous to the United States, or any political subdivision or any instrumentality of any such country is unreasonable or discriminatory and burdens or restricts United States transportation companies providing, or seeking to provide, motor carrier transportation to, from, or within such foreign country, the President or such delegate may—

(A) seek elimination of such practices through consultations; or

(B) notwithstanding any other provision of law, suspend, modify, amend, condition, or restrict operations, including geographical restriction of operations, in the United States by motor carriers of property or passengers domiciled in such foreign country or owned or controlled by persons of such foreign country.

(2) EQUALIZATION OF TREATMENT.—Any action taken under paragraph (1)(A) to eliminate an act, policy, or practice shall be so devised so as to equal to the extent possible the burdens or restrictions imposed by such foreign country on United States transportation companies.

(3) REMOVAL OR MODIFICATION.—The President, or the delegate thereof, may remove or modify in whole or in part any action taken under paragraph (1)(A) if the President or such delegate determines that such removal or modification is consistent with the obligations of the United States under a trade agreement or with United States transportation policy.

(4) PROTECTION OF EXISTING OPERATIONS.—Unless and until the President, or the delegate thereof, makes a determination under paragraph (1) or (3), nothing in this subsection shall affect—

(A) operations of motor carriers of property or passengers domiciled in any contiguous foreign country or owned or controlled by persons of any contiguous foreign country permitted in the commercial zones along the United States-Mexico border as such zones were defined on December 31, 1995; or

(B) any existing restrictions on operations of motor carriers of property or passengers domiciled in any contiguous foreign country or owned or controlled by persons of any contiguous foreign country or any modifications thereof pursuant to section 6 of the Bus Regulatory Reform Act of 1982.

(5) PUBLICATION; COMMENT.—Unless the President, or the delegate thereof, determines that expeditious action is required, the President shall publish in the Federal Register any determination under paragraph (1) or (3), together with a description of the facts on which such a determination is based and any proposed action to be taken pursuant to paragraph (1)(B) or (3), and provide an opportunity for public comment.

(6) DELEGATION TO SECRETARY.—The President may delegate any or all authority under this subsection to the Secretary, who shall consult with other agencies as appropriate. In accordance with the directions of the President, the Secretary may issue regulations to enforce this subsection.

(7) CIVIL ACTIONS.—Either the Secretary or the Attorney General may bring a civil action in an appropriate district court of the United States to enforce this subsection or a regulation prescribed or order issued under this subsection. The court may award appropriate relief, including injunctive relief.

(8) LIMITATION ON STATUTORY CONSTRUCTION.—This subsection shall not be construed as affecting the requirement for all foreign motor carriers and foreign motor private carriers operating in the United States to comply with all applicable laws and regulations pertaining to fitness, safety of operations, financial responsibility, and taxes imposed by section 4481 of the Internal Revenue Code of 1986.

(d) TRANSITION RULE.—

(1) IN GENERAL.—Pending the implementation of the rule-making required by section 13908, the Secretary may register a person under this section—

(A) as a motor common carrier if such person would have been issued a certificate to provide transportation as a motor common carrier under this subtitle on December 31, 1995; and

(B) as a motor contract carrier if such person would have been issued a permit to provide transportation as a motor contract carrier under this subtitle on such day.

(2) DEFINITIONS.—In this subsection, the terms "motor common carrier" and "motor contract carrier" have the meaning such terms had under section 10102 as such section was in effect on December 31, 1995.

(3) TERMINATION.—This subsection shall cease to be in effect on the transition termination date.

(e) PENALTIES FOR FAILURE TO COMPLY WITH REGISTRATION REQUIREMENTS.—In addition to other penalties available under law, motor carriers that fail to register their operations as required by this section or that operate beyond the scope of their registrations may be subject to the following penalties:

(1) OUT-OF-SERVICE ORDERS.—If, upon inspection or investigation, the Secretary determines that a motor vehicle providing transportation requiring registration under this section is operating without

a registration or beyond the scope of its registration, the Secretary may order the vehicle out-of-service. Subsequent to the issuance of the out-of-service order, the Secretary shall provide an opportunity for review in accordance with section 554 of title 5, United States Code; except that such review shall occur not later than 10 days after issuance of such order.

(2) PERMISSION FOR OPERATIONS.—A person domiciled in a country contiguous to the United States with respect to which an action under subsection (c)(1)(A) or (c)(1)(B) is in effect and providing transportation for which registration is required under this section shall maintain evidence of such registration in the motor vehicle when the person is providing the transportation. The Secretary shall not permit the operation in interstate commerce in the United States of any motor vehicle in which there is not a copy of the registration issued pursuant to this section.

(f) MODIFICATION OF CARRIER REGISTRATION.—

(1) IN GENERAL.—On and after the transition termination date, the Secretary—

(A) may not register a motor carrier under this section as a motor common carrier or a motor contract carrier;

(B) shall register applicants under this section as motor carriers; and

(C) shall issue any motor carrier registered under this section after that date a motor carrier certificate of registration that specifies

whether the holder of the certificate may provide transportation of persons, household goods, other property, or any combination thereof.

(2) PRE-EXISTING CERTIFICATES AND PERMITS.—The Secretary shall redesignate any motor carrier certificate or permit issued before the transition termination date as a motor carrier certificate of registration. On and after the transition termination date, any person holding a motor carrier certificate of registration redesignated under this paragraph may provide both contract carriage (as defined in section 13102(4)(B)) and transportation under terms and conditions meeting the requirements of section 13710(a)(1). The Secretary may not, pursuant to any regulation or form issued before or after the transition termination date, make any distinction among holders of motor carrier certificates of registration on the basis of whether the holder would have been classified as a common carrier or as a contract carrier under—

(A) subsection (d) of this section, as that section was in effect before the transition termination date; or

(B) any other provision of this title that was in effect before the transition termination date.

(3) TRANSITION TERMINATION DATE DEFINED.—In this section, the term "transition termination date" means the first day of January occurring more than 12 months after the date of enactment of the Unified Carrier Registration Act of 2005.

(g) MOTOR CARRIER DEFINED.—In this section and sections 13905 and 13906, the term "motor carrier" includes foreign motor private carriers.

6. 49 U.S.C. 14501 provides:

Federal authority over intrastate transportation

(a) MOTOR CARRIERS OF PASSENGERS.—

(1) LIMITATION ON STATE LAW.—No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to—

(A) scheduling of interstate or intrastate transportation (including discontinuance or reduction in the level of service) provided by a motor carrier of passengers subject to jurisdiction under subchapter I of chapter 135 of this title on an interstate route;

(B) the implementation of any change in the rates for such transportation or for any charter transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required; or

(C) the authority to provide intrastate or interstate charter bus transportation.

This paragraph shall not apply to intrastate commuter bus operations, or to intrastate bus transportation of any nature in the State of Hawaii.

(2) MATTERS NOT COVERED.—Paragraph (1) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle, or the authority of a State to regulate carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

(b) FREIGHT FORWARDERS AND BROKERS.—

(1) GENERAL RULE.—Subject to paragraph (2) of this subsection, no State or political subdivision thereof and no intrastate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to intrastate rates, intrastate routes, or intrastate services of any freight forwarder or broker.

(2) CONTINUATION OF HAWAII'S AUTHORITY.—Nothing in this subsection and the amendments made by the Surface Freight Forwarder Deregulation Act of 1986 shall be construed to affect the authority of the State of Hawaii to continue to regulate a motor carrier operating within the State of Hawaii.

(c) MOTOR CARRIERS OF PROPERTY.—

(1) GENERAL RULE.—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related

to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) MATTERS NOT COVERED.—Paragraph (1)—

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the intrastate transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

(3) STATE STANDARD TRANSPORTATION PRACTICES.—

(A) CONTINUATION.—Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or

more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to—

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent-van line operations (as set forth in section 13907),

if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) REQUIREMENTS.—A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if—

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this part or a regulation issued by the Secretary or the Board under this part; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) ELECTION.—Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

(4) NONAPPLICABILITY TO HAWAII.—This subsection shall not apply with respect to the State of Hawaii.

(5) LIMITATION ON STATUTORY CONSTRUCTION.—Nothing in this section shall be construed to prevent a State from requiring that, in the case of a motor vehicle to be towed from private property without the consent of the owner or operator of the vehicle, the person towing the vehicle have prior written authorization from the property owner or lessee (or an employee or agent thereof) or that such owner or lessee (or an employee or agent thereof) be present at the time the vehicle is towed from the property, or both.

(d) PRE-ARRANGED GROUND TRANSPORTATION.—

(1) IN GENERAL.—No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law requiring a license or fee on account of the fact that a motor vehicle is providing pre-arranged ground transportation service if the motor carrier providing such service—

(A) meets all applicable registration requirements under chapter 139 for the interstate transportation of passengers;

(B) meets all applicable vehicle and intrastate passenger licensing requirements of the State or States in which the motor carrier is domiciled or registered to do business; and

(C) is providing such service pursuant to a contract for—

(i) transportation by the motor carrier from one State, including intermediate stops, to a destination in another State; or

(ii) transportation by the motor carrier from one State, including intermediate stops in another State, to a destination in the original State.

(2) INTERMEDIATE STOP DEFINED.—In this section, the term "intermediate stop", with respect to transportation by a motor carrier, means a pause in the transportation in order for one or more passengers to engage in personal or business activity, but only if the driver providing the transportation to such passenger or passengers does not, before resuming the transportation of such passenger (or at least 1 of such passengers), provide transportation to any other person not included among the passengers being transported when the pause began.

(3) MATTERS NOT COVERED.—Nothing in this subsection shall be construed—

(A) as subjecting taxicab service to regulation under chapter 135 or section 31138;

(B) as prohibiting or restricting an airport, train, or bus terminal operator from contracting to provide preferential access or facilities to one or more providers of pre-arranged ground transportation service; and

(C) as restricting the right of any State or political subdivision of a State to require, in a nondiscriminatory manner, that any individual operating a vehicle providing prearranged ground transportation service originating in the State or political subdivision have submitted to pre-licensing drug testing or a criminal background investigation of the records of the State in which the operator is domiciled, by the State or political subdivision by which the operator is licensed to provide such service, or by the motor carrier providing such service, as a condition of providing such service.

7. 49 U.S.C. 14506 (2006 & Supp. V 2011) provides:

Identification of vehicles

(a) RESTRICTION ON REQUIREMENTS.—No State, political subdivision of a State, interstate agency, or other political agency of two or more States may enact or enforce any law, rule, regulation standard, or other provision having the force and effect of law that requires a motor carrier, motor private carrier, freight forwarder, or leasing company to display any form of identification on or in a commercial motor vehicle (as

defined in section 14504a), other than forms of identification required by the Secretary of Transportation under section 390.21 of title 49, Code of Federal Regulations.

(b) EXCEPTION.—Notwithstanding subsection (a), a State may continue to require display of credentials that are required—

(1) under the International Registration Plan under section 31704;

(2) under the International Fuel Tax Agreement under section 31705 or under an applicable State law if, on October 1, 2006, the State has a form of highway use taxation not subject to collection through the International Fuel Tax Agreement;

(3) under a State law regarding motor vehicle license plates or other displays that the Secretary determines are appropriate;

(4) in connection with Federal requirements for hazardous materials transportation under section 5103; or

(5) in connection with the Federal vehicle inspection standards under section 31136.

8. 49 U.S.C. 41713 provides:

Preemption of authority over prices, routes, and service

(a) DEFINITION.—In this section, "State" means a State, the District of Columbia, and a territory or possession of the United States.

(b) PREEMPTION.—(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

(2) Paragraphs (1) and (4) of this subsection do not apply to air transportation provided entirely in Alaska unless the transportation is air transportation (except charter air transportation) provided under a certificate issued under section 41102 of this title.

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

(4) TRANSPORTATION BY AIR CARRIER OR CARRIER AFFILIATED WITH A DIRECT AIR CARRIER.—

(A) GENERAL RULE.—Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(B) MATTERS NOT COVERED.—Subparagraph (A)—

(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii) does not apply to the transportation of household goods, as defined in section 13102 of this title.

(C) APPLICABILITY OF PARAGRAPH (1).—This paragraph shall not limit the applicability of paragraph (1).

9. 49 App. U.S.C. 1305 (1992) provides:

(a) Preemption

(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

(2) Except with respect to air transportation (other than charter air transportation) provided pursuant to a certificate issued by the Board under section 1371 of this Appendix, the provisions of paragraph (1) of this subsection shall not apply to any transportation by air of persons, property, or mail conducted wholly within the State of Alaska.

(b) Proprietary power and rights

(1) Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights.

(2) Any aircraft operated between points in the same State (other than the State of Hawaii) which in the course of such operation crosses a boundary between two States, or between the United States and any other country, or between a State and the beginning of the territorial waters of the United States, shall not, by reason of crossing such boundary, be considered to be operating in interstate or overseas air transportation

(c) Existing State authority

When any intrastate air carrier which on August 1, 1977, was operating primarily in intrastate air transportation regulated by a State receives the authority to provide interstate air transportation, any authority received from such State shall be considered to be part of its authority to provide air

transportation received from the Board under subchapter IV of this chapter, until modified, suspended, amended, or terminated as provided under such subchapter

(d) "State" defined

For purposes of this section, the term "State" means any State, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, the Virgin Islands, and any territory or possession of the United States.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
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No. 11-798

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, ET AL.,

Respondents.

On Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* AIRLINES FOR AMERICA IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Title 49 U.S.C. § 14501(c)(1), originally enacted as a provision of the Federal Aviation Administration Authorization Act of 1994, provides that "a State [or] political subdivision . . . may not enact or enforce a law, regulation or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." It contains an exception providing that the express preemption clause "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." *Id.* § 14501(c)(2)(A). The questions presented are:

1. Whether an unexpressed "market participant" exception exists in Section 14501(c)(1) and permits a municipal governmental entity to take action that conflicts with the express preemption clause, occurs in a market in which the municipal entity does not participate, and is unconnected with any interest in the efficient procurement of services.

2. Whether permitting a municipal governmental entity to bar federally licensed motor carriers from access to a port operates as a partial suspension of the motor carriers' federal registration, in violation of *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954).

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BRIEF OF *AMICUS CURIAE* AIRLINES FOR AMERICA IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Airlines for America (A4A), formerly known as the Air Transport Association of America, Inc., is the trade organization of the principal U.S. airlines. It represents the interests of eleven airline members and one associate airline member, which together transport more than ninety percent of U.S. airline passenger and cargo traffic. Those members are Alaska Airlines, Inc.; American Airlines, Inc.; Atlas Air, Inc.; Delta Air Lines, Inc.; Federal Express Corporation; Hawaiian Airlines, Inc.; JetBlue Airways Corp.; Southwest Airlines Co.; United Continental Holdings, Inc.; United Parcel Service Co.; US Airways, Inc.; and Air Canada, which is an associate member.[2]

The mission of A4A is to foster a business and regulatory environment that ensures safe and secure air transportation while permitting U.S. airlines to flourish, thus stimulating economic growth locally, nationally, and internationally. As part of that mission, A4A seeks to identify, highlight, and

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[1] Pursuant to Supreme Court Rule 37, *amicus* states that no counsel for a party authored this brief in whole or in part, and no one other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

[2] A4A also has a number of airline-related industry partners and members, a list of which is available at http://www.airlines.org/Pages/Members.aspx.

challenge laws and government policies that impose inappropriate regulatory burdens or unfairly impinge on the free operation of the marketplace for the services of its members. Throughout its seventy-five-plus year history, A4A has been actively involved in the development of the law applicable to commercial air transportation by advocating common industry positions on policy and legal issues of interest and importance to its members.

A4A has frequently participated as *amicus curiae* before this Court and other courts. In particular, A4A has participated as *amicus curiae* in litigation relating to the preemption provision of the Airline Deregulation Act of 1978 ("ADA"), Pub. L. No. 95-504, § 4(a), 92 Stat. 1705, 1708 (1978) (currently codified, as amended, at 49 U.S.C. § 41713(b)(1)), which has long prevented air carriers from being subject to a complicated patchwork of state regulations by prohibiting states and municipalities from enacting or enforcing laws or regulations directly or indirectly "related to" an air carrier's prices, routes, or services.[3] This Court has recognized that the preemption provision in the subsequently enacted Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), Pub. L. No. 103-305, Title VI, § 601(b)-(c), 108 Stat. 1569, 1605-06

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[3] Contrary to what the Ninth Circuit's opinion says, the ADA is no longer codified at 49 U.S.C. app. § 1305(a)(1) and no longer refers to "rates" rather than "prices." *Cf. Am. Trucking Ass'ns v. City of L.A. ("ATA")*, 660 F.3d 384, 396 n.8 (9th Cir. 2011). In 1994, the ADA was recodified at its current location with technical changes (including the change from "rates" to "prices") that Congress intended to have no substantive effect. *See Am. Airlines v. Wolens*, 513 U.S. 219, 222-23 & n.1 (1995).

(1994) (currently codified at 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A)), which is at issue in this case, has the same preemptive effect as the ADA, and cases interpreting the FAAAA also affect the ADA (and vice versa). *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008).

Proper application of ADA preemption, and by extension FAAAA preemption, is of critical importance to A4A's members, which rely on ADA preemption to shield airlines from a complicated patchwork of state regulations by prohibiting states from enacting or enforcing laws or regulations "related to" the prices, routes, or services of an airline. Carriers routinely rely on nationally uniform rules governing interstate transportation by air in structuring their business dealings with a variety of third parties, just as Congress envisioned they would. Judicial rulings that allow a patchwork of local laws and regulations undermine the ability of A4A members to operate efficiently, innovate, plan and make informed decisions about their business relationships. The Ninth Circuit's decision below would allow for such a patchwork and conflicts with decisions from this Court. Accordingly, a reversal of that decision by this Court is crucial to A4A's members.

BACKGROUND AND SUMMARY OF THE ARGUMENT

Because the preemptive language in the FAAAA is the same as that in the ADA, and cases interpreting the FAAAA also apply to the ADA, the Ninth Circuit's decision below affects not only motor

carriers, but also air carriers such as A4A's airline members because it impacts the interpretation of the ADA preemption provision on which they rely.

Congress passed the ADA in 1978 to release the air transportation industry from intensive regulation, based on its determination that deregulation would best further the goals of "efficiency, innovation, and low prices as well as variety and quality of air transportation services." *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992) (quotation marks and alterations omitted). Congress recognized, however, that the states could easily undo its deregulation efforts by enacting their own regulations governing air carriers. *Id.* With fifty states in the union, plus the District of Columbia and various territories, airlines were potentially subject to more than fifty regulatory schemes, not to mention an array of municipal and local regulations, each with its own obligations and prohibitions. The resulting patchwork of laws would utterly defeat Congress' goal of deregulating air carriers. Congress, unwilling to permit this evisceration of its efforts, resolved the problem by including a broad preemption clause in the ADA. *Id.* at 378-79 ("To ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a preemption provision . . . ."). Subject to certain express exceptions, the ADA preempts any "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier . . . ." 49 U.S.C. § 41713(b)(1).

Congress later recognized that motor and intermodal carriers also needed the benefit of this

"deliberately expansive" preemption clause, *Morales*, 504 U.S. at 384, so it extended the same preemption to them through the FAAAA. The FAAAA expressly preempts, in relevant part, any "law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier," 49 U.S.C. § 14501(c)(1), or "air carrier or carrier affiliated with a direct air carrier through common controlling ownership," *id.* § 41713(b)(4)(A) (hereinafter, "intermodal carrier"). Congress made clear its intent that the preemptive effect of these provisions is the same as that of the ADA, and this Court has therefore held that cases interpreting one statute's preemption provision apply with equal force to the preemption provision of the other statute. *See Rowe*, 552 U.S. at 370.

This Court has addressed ADA and FAAAA preemption on three occasions, and each time it has reaffirmed its breadth and expansiveness. In *Morales*, this Court held that the preemptive language used by Congress in the ADA "express[es] a broad preemptive purpose," has a "broad scope" and "expansive sweep," and is both "deliberately expansive" and "conspicuous for its breadth." 504 U.S. at 383-84. Given this starting point, the Court rejected the suggestion that the ADA prevents states only from "actually prescribing rates, routes, or services"; applies only to laws specifically addressed to the airline industry; or preempts only state laws that are inconsistent with federal law. *Id.* at 385-87. Instead, this Court held that the ADA preempts *any* state law having a connection with or reference to an airline's prices, routes, or services, unless that connection or reference is "too tenuous, remote, or

peripheral . . . to have preemptive effect." *Id.* at 384, 390.[4]

Three years later, in *American Airlines v. Wolens*, 513 U.S. 219 (1995), this Court reaffirmed the far-reaching scope of ADA preemption. It held that even state laws of general applicability affecting "unessential" airline matters—such as frequent flier programs—are sufficiently "related to" air carriers' prices, routes and services as to be preempted by the ADA. *Id.* at 226-27. The Court also held that the ADA prevents states not only from enacting statutes or enforcing state common law in a way affecting an air carrier's prices, routes, or services, but also from enforcing, in breach of contract actions, anything other than the specific terms agreed on by the parties. *Id.* at 232-33 (the ADA "confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement"). In sum, this Court held, states "may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier," whether by statute or common law or equitable contract doctrines. *Id.* at 229 n.5.

Most recently, in 2008, relying on *Morales* and *Wolens*, this Court held that the FAAAA preempts local laws that affect motor carriers' services even indirectly. *Rowe*, 552 U.S. at 372 ("We concede that the regulation here is less 'direct' than it might be, for it tells *shippers* what to choose rather than *carriers*

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[4] Although the Court mentioned this outer limit, it "express[ed] no views about where it would be appropriate to draw th[at] line." *Id.* at 390.

what to do."). The relevant inquiry is the *effect* of the local law, and the FAAAA preempts state regulation, whether direct or indirect, "of the essential details of a motor carrier's system for picking-up, sorting, and carrying goods—essential details of the carriage itself." *Id.* at 373.

Thus, this Court has on every occasion emphasized and affirmed the broad scope of ADA and FAAAA preemption.

The Ninth Circuit's decision is contrary to this established breadth and expansive scope of FAAAA and ADA preemption, however. The Ninth Circuit read into the FAAAA a broad, non-textual "market-participant" exception to save from preemption certain local requirements that "relate to" carriers' prices, routes or services, in disregard of relevant decisions from this Court. Specifically, the Ninth Circuit failed to consider several "express or implied indications" making clear that Congress did not intend for a general market-participant exception to apply to the FAAAA. Congress knows how to include a market-participant exception to preemption when it wants to, but it did not include such an exception in the FAAAA—despite including several other express exceptions. This omission is particularly telling since the ADA, on which the FAAAA's preemption provision is based, *does* include an express (albeit narrow) market-participant exception. Further, while this Court has made clear that the FAAAA and ADA preserve air and motor carriers' ability to contract with third parties free from state policy interference, the Ninth Circuit's decision improperly allows municipalities to impose their own policy

decisions as a precondition to such third-party contracts. Approving the Ninth Circuit's decision would allow states and municipalities around the country to impose their own policies and regulations on motor carriers, in violation of the primary purpose of ADA and FAAAA preemption, which is to avoid a non-uniform patchwork of regulations around the country. Accordingly, this Court should reverse the Ninth Circuit's decision.

ARGUMENT

The Ninth Circuit's decision below is due to be reversed because it inappropriately created a broad exception that is nowhere contained in the FAAAA—the market-participant exception—to save from preemption local requirements that "relate to" carriers' prices, routes or services. *Am. Trucking Ass'ns v. City of L.A. ("ATA")*, 660 F.3d 384, 406-07, 409 (9th Cir. 2011). The application of this broad, non-textual exception to the FAAAA, in disregard of relevant decisions from this Court, concerns air carriers because the Ninth Circuit or other courts may also attempt to apply it to the ADA, notwithstanding that the ADA, unlike the FAAAA, already contains an express but limited market-participant exception to preemption.

The Ninth Circuit's decision below marks a continued expansion by lower courts of the contexts in which a market-participant exception is applied. The market-participant doctrine initially arose in a series of dormant Commerce Clause cases. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429, 440 (1980); *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93

(1984) (plurality). Since then, courts, including this Court, also have applied a market-participant exception in cases involving implied preemption under the National Labor Relations Act ("NLRA"). *See, e.g., Bldg. & Constr. Trades Council v. Assoc. Bldrs. & Contractors, ("Boston Harbor")*, 507 U.S. 218, 226-27 (1993). Some lower courts, particularly the Ninth Circuit, have gone further and created a market-participant exception to statutes, including the FAAAA, that contain express preemption provisions but no market-participant exception. *See, e.g., Assoc. Gen. Contractors v. Metro. Water Dist.*, 159 F.3d 1178, 1182-85 (9th Cir. 1998) (creating a market-participant exception to ERISA's express preemption provision); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1043 (9th Cir. 2007) (creating a market-participant exception to the Clean Air Act's express preemption provision); *Cardinal Towing & Auto Repair v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999) (creating a market-participant exception to the FAAAA's express preemption provision). Prior to this case, however, no court had applied a market-participant exception to the FAAAA outside the limited factual circumstance of the provision of nonconsensual towing services to a municipality. Pet. at 10-11.

The Ninth Circuit's creation of a market-participant exception to the FAAAA in this case is contrary to relevant decisions from this Court regarding the applicability of the exception. This Court has made clear that a market-participant exception does not apply in all contexts where Congress has acted: "the 'market participant' doctrine reflects the particular concerns underlying

the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted." *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 289 (1986). In considering whether a market-participant exception to preemption applies, a court must assess whether there is "*any* express *or implied* indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests," which precludes application of a market-participant exception. *Boston Harbor*, 507 U.S. at 231-32 (emphasis added). As this Court has recently reiterated, "[w]hen a federal law contains an express preemption clause, we focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Commerce v. Whiting*, __ U.S. __, 131 S.Ct. 1968, 1977 (2011) (quotation marks omitted).

Here, the Ninth Circuit created a market-participant exception to FAAAA preemption without conducting the necessary inquiry about congressional intent. Specifically, the Ninth Circuit failed to consider whether there is "any express or implied indication by Congress" against application of a market-participant exception to FAAAA preemption. *Boston Harbor*, 507 U.S. at 231. In fact, there are several concrete indications against such an exception. To start, there is the plain statutory language. Congress carefully calibrated FAAAA preemption through a number of specific, express exceptions—for state requirements related to motor-vehicle safety, highway route controls and limits, and insurance; the transportation of household goods; non-consensual towing; and the state of Hawaii—yet

it omitted any general market-participant exception like the one applied by the Ninth Circuit. 49 U.S.C. §§ 14501(c)(2)–(5), 41713(b)(4)(B).

Congress knows how to include expressly a market-participant exception when it wants to do so. *See, e.g.*, *id.* § 32919(c) (expressly excepting from preemption state fuel economy standards for automobiles obtained for the state's own use); *id.* § 32304(i) (same for state motor vehicle labeling requirements); 15 U.S.C. § 1476(b) (same for state packaging requirements for household substances obtained for the state's own use); *id.* § 1203(b) (same for state flammability standards for fabric obtained for the state's own use); *see also* Br. for Petitioner at 27. Congress' omission of such an express market-participant exception from the FAAAA indicates that Congress did not intend for it to apply.[5] *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522-23 (1984) ("Obviously, Congress knew how to draft an exclusion for collective-bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress" did not intend for the exclusion to apply); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").

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[5] Arguably, the FAAAA's exception for state requirements relating to the price of non-consensual towing services, 49 U.S.C. § 14501(c)(2)(C), is a market-participant exception, *see* Br. for Petitioner at 27. The contrast between that narrow, express exception and the expansive, non-textual market-participant exception created by the Ninth Circuit is striking.

The omission of an express market-participant exception from the FAAAA is even more significant given that Congress specifically *included* such an exception—albeit a narrow one[6]—in the ADA. Section 41713(b)(3) of Title 49 expressly provides that the ADA's preemption provision "does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights." Congress included this express exception when enacting the ADA because it "recognized that airport proprietors—the majority of which are municipalities—were best equipped to handle local problems arising at and around their facilities." *Am. Airlines v. DOT*, 202 F.3d 788, 805 (5th Cir. 2000) (internal citation omitted).

Congress was undeniably aware of the ADA's preemption provision, and its narrow market-participant exception for state and local airport proprietors, when it enacted the FAAAA. In fact, the stated purpose of the FAAAA was to extend ADA preemption to motor and intermodal carriers, and Congress used the ADA's preemption language in the FAAAA. H.R. Rep. No. 103-677, at 82-85 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1754-60. Yet, Congress failed to include an analogous market-participant exception in the FAAAA. This omission strongly indicates that Congress did not intend for a market-participant exception to apply to

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[6] See discussion, *infra*, at 15.

the FAAAA. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (explaining that if Congress had intended to restrict a statutory section, it would have done so expressly, as it did in another section) (quotation marks and alteration omitted); *United States v. Naftalin*, 441 U.S. 768, 773-74 (1979) (refusing to read language from one provision into parallel provisions because "Congress did not write the statute that way"); *Pac. Operators Offshore, LLP v. Valladolid*, __ U.S. __, 132 S.Ct. 680, 687-88 (2012) ("[O]ur usual practice is to make the . . . inference" that Congress acts intentionally and purposely when it includes a restriction in one section of a statute but omits it in another section).

Finally, there are "express or implied indication[s]" that Congress respects carriers' contracts with third parties and would not want state or local authorities imposing their "public policies or theories" as a precondition to the carriers' fulfillment of those contracts under a market-participant exception. As this Court has previously concluded, Congress, in enacting the ADA, "presuppose[d] the vitality of contracts governing transportation by air carriers." *Wolens*, 513 U.S. at 230. Thus, this Court held on the one hand that private parties may pursue breach of contract actions to enforce "a term" that an airline itself had "stipulated." *Id.* at 232-33. On the other hand, this Court held that the ADA forbids state or local authorities from seeking "to impose

their own public policies or theories of competition or regulation on the operations of an air carrier." *Id.* at 229 n.5. Here, the Ninth Circuit's market-participant exception improperly allows the port authorities to impose their "public policies or theories" on carriers as a precondition to the port access necessary for fulfilling the carriers' drayage contracts with third parties.

The port authorities' attempt to control participation in the drayage services market—a market in which they undisputedly do not participate—through the concession agreements is analogous to state efforts to influence the labor market through restrictions on the receipt or use of state funds. *Chamber of Commerce v. Brown*, 554 U.S. 60, 70-71 (2008); *Gould*, 475 U.S. at 291.[7] This Court correctly has held that such activity—which is "neither specifically tailored to one particular job nor a legitimate response to state procurement constraints or to local economic needs"—is that of a market regulator, and thus is not saved from preemption by a market-participant exception. *Brown*, 554 U.S. at 70 (quotation marks omitted). As this Court has recognized, because "government occupies a unique position of power in our society," it can exercise its proprietary powers in ways that are "tantamount to regulation," and "its conduct,

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[7] It is likewise analogous to Alaska's effort to use its proprietary timber rights to influence timber processing, a market in which Alaska did not participate. *Wunnicke*, 467 U.S. at 95-99; *id.* at 99 ("Instead of merely choosing its own trading partners, the State is attempting to govern the private, separate, economic relationships of its trading partners . . . .").

regardless of form, is" therefore "rightly subject to special restraints." *Gould*, 475 U.S. at 289-90.

The Ninth Circuit's improper application of a non-textual market-participant exception to the FAAAA is an important issue to air carriers. Although the ADA, unlike the FAAAA, does include an express market-participant exception, as discussed above, that exception is narrowly limited to specific proprietary powers and rights related to airports. 49 U.S.C. § 41713(b)(3). Courts have recognized the narrow scope of this exception. *See Am. Airlines*, 202 F.3d at 806 (explaining that "courts have recognized that local proprietors play an 'extremely limited' role in the regulation of aviation," and citing cases). The non-textual market-participant exception created by the Ninth Circuit in this case, however, is broadly expansive. *See* Pet. at 32. Given that cases interpreting the FAAAA also apply to the ADA, and vice versa, the Ninth Circuit's decision could result in courts applying this broad, non-textual market-participant exception to the ADA, notwithstanding the limited, express market-participant exception in the ADA itself. This Court should reverse the Ninth Circuit's decision and clarify that, for purposes of the ADA and FAAAA, the only applicable market-participant exceptions (like all exceptions to ADA and FAAAA preemption) are those that are expressly found in the statutes themselves.

CONCLUSION

A4A respectfully urges the Court to reverse the judgment of the court of appeals.

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February 22, 2013

AMICUS CURIAE BRIEF

No. 11-798

In The Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AIRPORTS COUNCIL INTERNATIONAL – NORTH AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF AIRPORTS COUNCIL INTERNATIONAL – NORTH AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

Airports Council International – North America ("ACI-NA") represents the state, regional, and local government bodies that own and operate the principal commercial airports in North America.[1] ACI-NA's member airports serve approximately 95 percent of the domestic and international airline passenger and cargo traffic in the United States. ACI-NA's advocacy on behalf of its members includes participation as *amicus curiae* in order to ensure that applicable law promotes safe and efficient airport operations. ACI-NA has participated as intervenor or *amicus* in a number of cases to protect the ability of airports to exercise proprietary powers in diverse contexts. *E.g.*, *Nw. Airlines, Inc. v. Cnty. of Kent, Mich.*, 510 U.S. 355 (1994) (challenge to airport rates and charges); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S.

[1] Pursuant to Supreme Court Rule 37.6, no party's counsel authored this brief in whole or in part. No party, party's counsel, or person – other than ACI-NA – contributed money intended to fund preparing or submitting this brief. All parties consented to the filing of this *amicus* brief. Counsel notes, in the interest of full disclosure, that our Firm represents Los Angeles World Airports, which is a department of the City of Los Angeles, on matters unrelated to this case. Counsel has not, however, conferred with the City regarding this brief for ACI-NA.

672 (1992) (challenge to airport ban on solicitation); *Air Transp. Ass'n of Am. v. Dep't of Transp.*, 613 F.3d 206 (D.C. Cir. 2010) (proprietary right of airport sponsor to set congested-weighted landing fees not preempted even if fees designed to affect airline price, route, or service); *Air Transp. Ass'n of Am. v. Dep't of Transp.*, 119 F.3d 38 (D.C. Cir. 1997) (challenge to the Department of Transportation's Final Policy Regarding Airport Rates and Charges).

ACI-NA and its members have a particular interest in the first question presented in this case relating to the "market-participant" exception. Airports rely on their proprietary powers to accomplish a wide range of goals essential to assuring that airports remain financially viable and able to provide safe, high quality services to the traveling public. Petitioner American Trucking Associations ("ATA") and its *amici*, including in particular Airlines for America ("A4A"), seek to limit the scope of the unpreempted power of airports, ports, and other public proprietary entities by asking the Court to reject the long-recognized market-participant doctrine. A4A goes further and seeks to limit the scope of proprietary powers by (1) arguing that the Court should decline to acknowledge a market-participant exception to preemption except where it is expressed in the statute, and (2) asserting a narrow and incorrect construction of airport proprietary powers preserved in the express proprietor's rights exception in the Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b)(3) ("ADA").

ACI-NA and its members file this *amicus curiae* brief for two reasons. First, ACI-NA urges the Court to affirm the core principle of the Ninth Circuit's decision – that under the market-participant doctrine, the exercise of proprietary powers by publicly-owned enterprises is not preempted. Although this case is narrowly concerned with parking and placard conditions in a drayage truck concession agreement at the Port of Los Angeles ("Port"), the implications of this case extend to all publicly owned entities exercising proprietary powers, such as airports, ports, and utilities. Airports are particularly concerned with this case, because airports exercise proprietary powers in areas beyond the scope of the ADA's proprietor's exception, including, for example, managing vehicular traffic accessing their property (including trucks, buses, automobiles, courtesy vans, taxis, and aviation support vehicles), acquiring property for expansion and environmental mitigation, and setting the terms by which commercial entities may use airport property and facilities. The continued ability to exercise those proprietary powers is critical to allowing airports to manage the numerous commercial enterprises that operate on airports in order to provide the services demanded by the public and aeronautical users.

Second, ACI-NA opposes A4A's mischaracterization of the scope of the proprietor's exception under the ADA, 49 U.S.C. § 41713(b)(3). A4A seeks to use the analysis of the market-participant exception in the context of motor carrier preemption under 49

U.S.C. § 14501(c)(1) ("FAAA Act") as a means of limiting the scope of the express proprietor's exception under the ADA in the distinct context of airport operations. Courts, however, have long recognized a broad construction of airports' proprietary powers under the ADA, and have affirmed such proprietary power in a variety of contexts. The meaning and scope of the ADA's proprietor's exception is not before the Court, and the Court should reject A4A's effort to alter the well-established understanding regarding airport proprietary powers under the ADA.

SUMMARY OF ARGUMENT

The Court has long recognized that public entities act in a proprietary capacity when they participate in markets in the same manner that private entities do. *Building and Construct. Trades Council v. Associated Builders and Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 231-32 (1993) ("*Boston Harbor*"). The Court has further recognized that there is a difference under the law when public entities engage in regulatory actions as opposed to proprietary actions. Regulatory and proprietary actions warrant different treatment under the Commerce Clause and the Supremacy Clause because those Constitutional provisions address state and local regulatory actions, but not proprietary actions. Accordingly, the Court presumes that federal law does *not* preempt proprietary actions by state and local public entities, and that those public proprietary enterprises can operate

in the same unpreempted manner as private enterprises.

United States commercial airports are quintessential public proprietary entities. In providing air transportation services, airports operate like large commercial real-estate managers by leasing space to tenants, including airlines, and by managing and controlling how private entities use airport property and facilities for their own commercial purposes. Like any large, complex enterprise, airports face a wide range of operational challenges that they must overcome to provide transportation services in a safe and efficient manner. In addition, airport proprietors face complex business challenges relating to airport rents, rates, and charges; regulatory compliance; environmental challenges; and community opposition to expansion and changes in traffic patterns.

Airports principally meet these challenges by exercising their proprietary powers. Proprietary powers are, generally, those powers conferred on the airport's governing body by state and local law for the creation and operation of the airport as an enterprise. *See* J. Howick, *Analysis of Federal Laws, Regulations, and Case Law Regarding Airport Proprietary Rights*, Legal Research Digest 9 at 3-4 (Sept. 2010).[2] Proprietary powers are understood to encompass a broad range of commercial activities similar to

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[2] Available at http://onlinepubs.trb.org/onlinepubs/acrp/acrp_lrd_010.pdf.

those exercised by a private entity, *id.* at 4, including the power to contract, lease and manage property, set fees and charges, and control access to the airport. *Id.* at 19-32. While airports can possess governmental authority, airports primarily use their proprietary authority to manage their business operations. Although the exercise of proprietary power is generally limited by standards of reasonableness, airports exercise their proprietary powers to achieve a diverse range of goals. *Id. See also, e.g., Four T's, Inc. v. Little Rock Mun. Airport Comm'n*, 108 F.3d 909 (8th Cir. 1997) (an airport charging rent to car rental company under concession agreement acted as a market-participant and was not subject to Commerce Clause); *Transport Limousine of Long Island, Inc. v. Port Auth. of N.Y. and N.J.*, 571 F. Supp. 576 (E.D.N.Y. 1983) (market-participant exception applied to bar commerce clause claim challenging fee of 8% of gross receipts for use of counter space at airport by limousine company).

For example, airports establish rules for the commercial use of airport property and facilities by entering into contracts, leases, license agreements, and concession agreements with airport users. Airports also adopt specific programs to address particular issues, such as initiatives to allay community concerns over noise and other environmental impacts, to assure customer safety and satisfaction, and to overcome regulatory hurdles when undertaking infrastructure projects. Such proprietary actions are analogous to the actions taken by private landlords to

control the use of their property and the actions taken by large corporations to control their supply chain and preserve their market position.

In addition to the proprietary powers preserved from preemption in the airline context pursuant to 49 U.S.C. § 41713(b)(3), airports rely on their proprietary powers in other contexts where federal law generally preempts state and local law, such as in the regulation of motor carrier prices, routes, and services; labor; and environmental impacts. Changing current law to make those actions presumptively preempted, as urged by ATA, would substantially impair the ability of airports to carry out their proprietary functions by denying them the authority to take unilateral action. It would also expose airports to increased litigation, and the accompanying expense, over the scope of preemption. Where a private company could, for business needs, limit access to its property to vehicles meeting certain emissions requirements, an airport could be preempted from doing so because its rules could be considered a "regulation" subject to preemption.

The consequences of losing such proprietary power extend beyond the details of a specific facility or industry. Airports often include environmental mitigation measures in leases and contracts, for example, in order to obtain federal and state permits for expansion projects. Treating airport contractual practices like government regulations would impair airports' abilities to pursue critical infrastructure and

expansion projects compared to a similarly regulated private entity.

The purpose of the Supremacy Clause is to assure that federal law is the law of the land, rather than a patchwork of diverse state and local laws. Proprietary action by publicly owned enterprises is not regulation, and the supremacy of federal law is not threatened when public entities establish rules relating to the commercial use of their own property and facilities. The Court and lower courts have been able to distinguish between proprietary and regulatory conduct under the Court's existing precedents. There simply is no need to change current law and undermine the historic presumption against preemption of proprietary conduct.

ARGUMENT

I. Airports Operate as Proprietary, Business-like Enterprises

A. Airports Are Akin to Landlords for Complex Commercial Operations

The overwhelming majority of large commercial airports in the United States, including ACI-NA's member airports, are public entities. Municipalities or counties directly operate about half of the country's commercial airports, while special purpose

government agencies such as port authorities or airport authorities operate the other half.[3]

Despite public ownership, airports operate as independent financial entities. Airports earn revenue from airport leases, licenses, use agreements, and user fees such as landing fees. Federal laws require airports receiving federal funds to be self-sustaining and to use their revenue only for airport-related purposes, and not general governmental purposes. 49 U.S.C §§ 47107(a)(13), 47107(b), and 47133. Airports operate as "enterprise funds" separate and apart from the other funds and functions of the government entity that owns the airport, and manage their operations so the airport is self-sustaining and financially viable.

The operation of an airport is analogous to a large commercial real estate development. Airports rent terminal space to airlines, aeronautical service providers, food and retail concessionaires, airport rental car companies, and other private entities that provide goods and services to the traveling public. Airports grant permission to operate to the many subcontractors hired by airport tenants, such as baggage handlers, aviation fuel providers, aircraft service companies, and cargo companies. Airports also grant

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[3] There are a number of private airports in the United States, as well. For example, Branson Airport, a commercial airport in Branson, Missouri, is privately owned and managed and competes with publicly owned Springfield-Branson National Airport and Northwest Arkansas Regional Airport.

concessions or licenses to a variety of service providers who seek to take advantage of the market created by the airport, such as taxi and limousine operators, Wi-Fi service providers, off-airport parking operators, and off-airport rental car companies. For example, at Boston Logan International Airport ("Boston Logan"), there are approximately 550 different license, lease, concession, and operating agreements with a wide variety of aeronautical service providers and other airport users. These licensees employ approximately 15,750 persons. In contrast, Massport itself, which operates Boston Logan, employs less than 700 people at the airport.

Furthermore, airports function in a competitive marketplace. Airports, together with airlines, compete with other transportation modes. Many airports compete with other airports for customers. For example, Boston Logan competes with nearby airports in Manchester, New Hampshire and Providence, Rhode Island for passengers. Airports also compete with other airports for international service across a wider region. For example, airports as far apart as Seattle, Portland, San Francisco, and Los Angeles compete with one another for flights to Asia and the Pacific Rim.

B. Airports Use Leases, Licenses, and Concession Agreements to Advance Proprietary Interests

Airports face a number of challenges in managing their facilities, including:

- The need to make the airport safe and secure;
- The need to generate revenues to remain self-sustaining and control costs for airline tenants;
- The need to remain competitive with other airports and modes of transportation;
- The need to assure customer satisfaction to maintain their competitive position;
- The need to manage the risk of litigation from users, the community, and regulators;
- The need to comply with regulatory requirements and grant obligations across a broad range of activities, particularly environmental regulations; and
- The need to maintain the support of neighbors and other stakeholders for future expansion.

In addition to the daily challenges of managing a complex enterprise, airports often face larger challenges to their long-term development. Similar to the Port of Los Angeles's experience, airports often face community opposition to expansion and increased airport activity, even when necessary to assure the airport's continued viability in a competitive market. *See* Government Accountability Office, GAO-10-50, *Aviation and the Environment, Systematically Addressing Environmental Impacts and Community*

Concerns Can Help Airports Reduce Project Delays, at 1-2 (Sept. 2010) (noting that community opposition and related litigation can add years to the approval process for new runway projects). *See generally* J. Johnson, *Case Studies on Community Challenges to Airport Development*, Legal Research Digest 9 (June 2010) (surveying aviation related causes of action).[4] In addition to community opposition, airports also face complex regulatory and operational challenges when expanding or accommodating increased operations.

Airports address these challenges, in part, through terms and conditions of leases, licenses, and concession agreements. For example, like private hotels or apartments, airports often restrict the manner in which taxicab and limousine operators solicit business to assure a high level of service to airport customers and to promote customer satisfaction. Airports also rely on proprietary power to develop mitigation programs to meet environmental compliance obligations, such as Clean Air Act requirements to show conformity with State Implementation Plans. 42 U.S.C. § 7506(c); 40 C.F.R. Part 93, Subpart B. *See also Tinicum Twp. v. Dep't of Transp.*, 685 F.3d 288 (3d Cir. 2012) (summarizing airport's mitigation measures under Clean Air Act).

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[4] Available at http://onlinepubs.trb.org/onlinepubs/acrp/acrp_lrd_009.pdf.

For example, airports might require vehicles using the airport, including aeronautical ground service vehicles (like baggage tugs or loaders), taxicabs, courtesy vans, and delivery and freight trucks, to meet certain alternative fuel requirements. Several airports have implemented programs to increase the number of cleaner vehicles to reduce airport-related emissions. Although such efforts may be critical to obtain regulatory approval, avoid litigation, or gain community support for a project, under ATA's theory they could be challenged as preempted emissions standards under Section 209 of the Clean Air Act, or perhaps as affecting the prices, routes, and service of trucks under the FAAA Act. *See Engine Mfr's Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031 (9th Cir. 2007) (Clean Air Act did not preempt emission standards for agency's own fleet under market-participant exception). Airports also face complex environmental challenges under the Clean Water Act and other environmental laws that affect their business interests.

Similarly, airports make contracting choices that address community opposition to airport operations in general or to a particular project. If community concerns about air pollution, for example, threaten the ability of the airport to advance its proprietary interests, the airport should be able to increase the percentage of clean-burning vehicles on its property to address that concern, just as a private entity could. If such actions are deemed preempted, simply because they are undertaken by a public entity, airports

would be deprived of the legal authority to take any action in the preempted area, even if a private entity in the same situation would not be similarly constrained.

C. Overturning the Presumption Against Preemption Would Impair Proprietary Functions by Depriving Airports of the Power to Act in Preempted Areas

As described above, airports rely on their proprietary powers on a daily basis to manage their facilities and to develop new programs to promote the efficient operation and growth of their facilities. It is difficult to predict the possible future business challenges to operating an airport, the programs airports may pursue to meet those challenges, and what laws may be implicated by those programs. However, airports should be able to address those challenges in the same manner as private companies without being limited by principles of preemption (unless expressly stated or clearly implied by Congress). As the Court has explained, "[s]ince 'state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants,' '[e]venhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the [dormant] Commerce Clause.'" *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999) (quoting

White v. Mass. Council of Constr. Emp'rs, Inc., 460 U.S. 204, 207-08, n.3 (1983)).

Airports are currently subject to extensive oversight and regulation by FAA, even where there is no preemption. *E.g.*, 49 U.S.C. § 47107 (obligations imposed through federal grant assurances); 49 U.S.C. § 44706 (operating certificate requirements for commercial service airports); and 14 C.F.R. Part 139 (airport operating certificate regulations). In addition, airports are subject to regulation under a wide range of environmental, labor, occupational safety, and other laws. Further, when airports seek FAA approval for large development projects, FAA must demonstrate that the airport's project will comply with over 40 separate environmental laws; and FAA itself must study the project pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-47. *See* U.S. Department of Transportation, *Report to the U.S. Congress on Environmental Review of Airport Improvement Projects* at iii-iv (May 2001). Airports are also subject directly to numerous state environmental laws and procedures. *Id.*

Moreover, airport action remains subject to general constitutional standards; only restrictions on airport access that are "reasonable, nonarbitrary, and non-discriminatory" are not preempted. *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 806-07 (5th Cir. 2000) (summarizing cases); *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100, 104 (9th Cir. 1981) (curfew and other noise-control measures not preempted, but ban on jet operations struck down

on equal protection and commerce clause grounds); *City and County of San Francisco v. FAA*, 942 F.2d 1391 (9th Cir. 1991) (airport's ban on certain loud aircraft was not preempted, but violated obligations under FAA grants).

Because of Congress' retained authority to preempt or regulate proprietary conduct, a holding in this case that airports, ports, and similar public enterprises are presumptively preempted from taking *proprietary* action whenever there is express preemption of their *police powers* would go far beyond the purpose of the Supremacy Clause. There is no threat to federal authority when a publicly owned entity establishes conditions for the use of its own property by commercial entities who seek to use that property for private, commercial purposes. Nor is there a risk of a regulatory patchwork, as A4A argues, A4A Br. at 8, because the public entity would not be issuing regulations to third parties unrelated to the airport enterprise. Allowing public entities to take non-regulatory actions to manage their own property plainly does not undermine Congress' legislative power.

A holding that public entities are presumptively preempted from taking proprietary actions would deprive airports and similar public enterprises of the authority to take certain actions at all because of the preemptive force of federal law. Airports' proprietary hands would be tied unfairly in a way that comparable private enterprises are not. To the extent federal control is needed, direct regulation or express (or clearly implied) preemption is available without the

need to upset the long-established recognition of the powers of local governments to own and operate airports and similar facilities. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 197 (D.C. Cir. 1991) (federal government does not plan or develop airports).

II. Petitioners and Their *Amici* Fail to Demonstrate That the Court Should Overturn the Presumption in *Boston Harbor* that Preemption Does Not Apply to Proprietary Activity

A. The Lack of an Express Exception in Section 14501(c)(1) for Proprietary Action Does Not Imply an Intent to Preempt Proprietary Action

As the Port demonstrates in its brief, ATA fundamentally errs by reversing the presumption of non-preemption clearly set forth in *Boston Harbor*. Port Br. at 18-20. In an attempt to bolster their arguments, ATA and A4A argue that the inclusion of an express proprietor's exception in the ADA, but the absence of an express market-participant exception in the FAAA Act, reflects Congressional intent to preclude a market-participant exception to the FAAA Act. ATA Br. at 27-28; A4A Br. at 12. ATA and A4A rely on cases applying the canon of statutory construction that the inclusion of language in one part of a statute, but its omission in another part of the statute, reflects an intentional choice. *See Custis v. United States*, 511 U.S. 485, 492 (1994). While that

canon of statutory construction applies to different provisions in the *same* statute, it does not apply here because the FAAA Act and the ADA are *different* statutes, enacted at *different* times, and addressing *different* subjects. There is no recognized canon of statutory construction to allow such an inference here.

Second, the inclusion of the proprietor's exception in the ADA reflects a set of concerns particular to the aviation industry that do not apply to the trucking industry. There is no analogue in the trucking industry to the close, symbiotic relationship between airports and air carriers. Accordingly, when Congress enacted the ADA to deregulate the airline industry, and to preempt expressly state laws relating to airline prices, routes, and services, *it took particular care to preserve the recognized powers of airport owners to take proprietary actions that could affect airline prices, routes, and services.* For example, airport rents, landing fees, and other charges may have an effect on airline prices. Similarly, airport access rules, such as a curfew, have an effect on airline routes and services. Congress acted expressly to preserve these, and other, proprietary powers even if the exercise of proprietary authority would affect airline prices, routes, and services. Indeed, Congress has consistently been careful to preserve airport proprietary powers when otherwise preempting state laws in the aviation area. *E.g.*, 49 U.S.C. § 40116(c) (exempting airports from general prohibition on state and local taxes on passengers in air transportation).

See also, W. Airlines, Inc. v. Port Auth. of N.Y. and N.J., 658 F. Supp. 952, 956 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987) (discussing legislative history of aircraft noise legislation showing Congressional intent to preserve airport proprietary powers).

Third, Congress carefully included an express proprietor's exception in the ADA to ensure that the otherwise broad preemption provision did not preempt long-recognized proprietary powers. The legislative history of the ADA plainly reflects the strong desire of Congress to assure the preservation of existing airport proprietary powers. *W. Airlines*, 658 F. Supp. at 957 ("'the legislative history is unmistakably clear that Congress did not intend that the preemptive force of [49 U.S.C. § 41713(b)(1)] would interfere with "long recognized powers of the airport operators to deal with noise and other environmental problems at the local level."'") (quoting *Midway Airlines v. Cnty. of Westchester*, 584 F. Supp. 436, 440 n.18 (S.D.N.Y. 1984)). *See also* 124 Cong. Rec. 38526 (Oct. 14, 1978) (remarks of Congressman Anderson, House of Representatives sponsor, noting that House conferees did not intend to limit "in any way the normal exercise of a proprietor's power" to limit access to the airport or to set fees and charges). In acting to preempt portions of established law regarding regulation of airline rates, prices, and services, Congress was prudent to identify expressly what aspects of then-existing law related to airline prices,

routes, and services it intended to preempt and what it did *not* intend to preempt.[5]

Finally, Congress adopted the ADA *before* the Court decided *Boston Harbor,* so Congress did not have the benefit of the Court's clear statements that the exercise of proprietary powers is not presumptively preempted. In contrast, Congress adopted the FAAA Act *after* the Court decided *Boston Harbor*, and Congress can be presumed to have legislated with knowledge of the *Boston Harbor* decision, and intended to preserve the Court's presumption against preemption. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988).

Because of those particular concerns, the purposes behind the proprietor's exception to the ADA do not apply to, and cannot guide an analysis of, Congress' decision in the FAAA Act *not* to include an express proprietor's exception. The correct analysis, as explained by the Port, starts with the application of long-accepted background principles of preemption, including the general presumption *against* preemption of traditional local powers, and then considers

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[5] Similarly, when Congress amended 49 U.S.C. § 41713(b) to add Section 41713(b)(4)(B) which provides that Section 41713(b) does not preempt state and local regulation of certain airport-related aspects of motor vehicle transportation, including safety routes, financial responsibility, and hazardous material, it did so to preserve then-existing authority and to specify that such regulation is not regulation of airline prices, routes, and services. *See* Conference Report on H.R. 2139, reprinted in 140 Cong. Rec. H7051 at H7071 (Aug. 5, 1994).

whether Congress intended to disrupt the traditional allocation of federal and state authority.

B. The Unpreempted Proprietary Powers of Airports Are Broad

A4A attempts to bolster its argument that Congress intended the FAAA Act to preempt proprietary powers by contrasting the absence of an express market-participant exception in the FAAA Act with the inclusion of an express proprietor's exception in the ADA. A4A further argues that a broad market-participant exception would undermine what it characterizes as the ADA's "limited" scope of unpreempted proprietary power pursuant to the ADA's express exception for proprietary powers. A4A Br. at 15.

The premise of A4A's argument is false, however, because airport proprietary powers under the ADA are broad. As a general matter, the scope of airport proprietary powers is defined by state and local grants of power, not federal law. Federal law can only limit such power by preemption. In the case of airport proprietary powers, Congress acted explicitly to *preserve* the proprietary powers of publicly owned airports without any express or implied limitation. 49 U.S.C. § 41713(b)(3).

Those proprietary powers have been recognized to be broad. For example, courts recognize that the proprietary power of airports to set rates and charges, and to establish landing fees, even when such fees

were expressly intended to affect airline services, is not preempted.

> We recognize, of course, that prices alter behavior . . . and understand prices that vary from place to place will yield incentives that vary as well. Neither the ADA nor any other statute concerning air traffic, however, demands uniform prices or uniform incentives . . . In sum, although the ADA forbids states and local authorities from directly regulating air traffic, the structure the Congress created virtually ensures, and surely accepts, that fees will vary across airports. The resulting differences in incentives are unavoidable, not unlawful.

Air Transp. Ass'n of Am. v. Dep't of Transp., 613 F.3d at 216 (affirming airport proprietary power to impose landing fees to incentivize off-peak airline scheduling to reduce delays). *See also Air Transp. Ass'n of Am. v. City and Cnty. of San Francisco*, 266 F.3d 1064 (2001) (affirming proprietary power of city to require city contractors, including airport tenants, to provide benefits to same-sex partners).[6]

Moreover, "the precise scope of an airport owner's proprietary powers has not been clearly articulated by any court." *Am. Airlines*, 202 F.3d at 806. *See also W. Airlines*, 658 F. Supp. at 956 ("[49 U.S.C. § 41713(b)(3)] does not expressly limit proprietary

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[6] A4A was formerly known as the Air Transport Association. A4A Br. at 1.

powers to the regulation of noise, although presumably Congress would have so limited the section if that is what it had in mind"). As the Fifth Circuit explained, "[w]e do not limit the scope of proprietary rights to those which have been previously recognized. . . . Thus, we are open to assessing whether the restrictions in the Ordinance are reasonable and nondiscriminatory rules aimed at advancing a previously unrecognized local interest." *Am. Airlines*, 202 F.3d at 808 (citation omitted).

The only area where an airport's proprietary power may be considered to be judicially limited under the ADA is in the area of "regulation of aviation," *id.* at 202 F.3d at 806, where the federal government has retained the exclusive control over the use and regulation of the airspace. Thus, courts only acknowledge the "narrow" scope of airport proprietary powers when discussing the regulation of airspace. *Id.* at 806-07 (discussing cases involving perimeter rules, curfews, and other airport access restrictions). Counsel is not aware of a case identifying any other federal limits on the scope of airport proprietary powers under the ADA to manage access to, and use of, airport facilities.

The two other cases cited by A4A did not address proprietary powers and, thus, do not support the notion that airport proprietary powers are limited. *Morales v. Trans World Airlines, Inc.*, involved enforcement of state deceptive practices laws against airline advertising. 504 U.S. 374 (1992). Although *Morales* did not involve proprietary powers, the Court

implicitly recognized a broad understanding of proprietary powers by rejecting a narrow reading of the ADA's preemption provision, 49 U.S.C. § 41713(b), that would render the proprietor's exception, *id.* at § 41713(b)(3), surplusage. 504 U.S. at 385-86. Similarly, *American Airlines v. Wolens* involved a class action challenge to an airline frequent flier program under state consumer fraud laws without any discussion of airport proprietary powers. 513 U.S. 219 (1995). There simply is no basis for A4A's assertion that airport proprietary powers are limited in any area other than when airport access rules impinge on federal regulation of airspace.

C. The Use of Rules, License, Concession, and Similar Agreements to Advance Proprietary Objectives Is Not Regulatory in Nature

ATA and the United States argue that there is no need to consider the proprietary purpose of license conditions, because the concession agreement terms in dispute "clearly" have the force and effect of law and because licenses and similar agreements and rules are "quintessential regulations." ATA Br. at 20-23; U.S. Br. at 13-15. That argument simply is wrong.

The fact that a rule, license, or other contract may impose conditions on conduct does not make them "regulations" within the meaning of the Supremacy Clause. As Respondent Natural Resources Defense Council ("NRDC") demonstrates in its brief,

private corporations routinely impose detailed requirements on entities in their supply chains to assure quality control and certain standards of conduct. NRDC Br. at 30-31, 33-35. Shopping malls, industrial parks, and self-storage facilities, for example, impose a variety of rules and restrictions on tenant and visitor behavior. Although those requirements are imposed on others, there is little dispute that such conduct is related to the corporation's proprietary goals of maximizing profit, managing risk, protecting market share, and securing its place in the marketplace. NRDC Br. at 18-35. As this Court has recognized, government entities, like their private counterparts, exercise proprietary powers when they impose conditions on the conduct of others, and the legal treatment of such conduct depends on whether its actions are proprietary or regulatory in nature. *Boston Harbor*, 507 U.S. at 231-32. *See also College Savings Bank*, 527 U.S. at 685.

The United States also argues that recognizing a market-participant exception to preemption will make it too easy for public entities to use proprietary powers as a "thinly veiled" pretext for regulating in ways that would otherwise be preempted. U.S. Br. at 24. This concern also is unfounded. Applying existing law, the Court has had little difficulty distinguishing between proprietary and regulatory conduct. *Compare Boston Harbor*, 507 U.S. at 232 (labor contract provisions for a particular project were unpreempted proprietary actions) *with Chamber of Commerce of the U.S. v. Brown*, 554 U.S. 60 (2008) (state law limiting

use of state grants for labor organizing was regulatory). *See also Am. Airlines*, 202 F.3d at 808 (ordinance of Cities of Dallas and Fort Worth affecting operations at Love Field was insufficiently related to local interests to fall within proprietor's exception); *Cardinal Towing and Auto Repair v. City of Bedford*, 180 F.3d 686 (5th Cir. 1999) (City's power to contract for towing services was proprietary).

Accordingly, there is no need to change existing law to hold that rules established by a public entity, whether through a contract or otherwise, are regulatory simply because they were issued by a governmental entity or intended to affect the behavior of others. Private entities impose rules on suppliers and vendors, and often enforce such rules with punitive or liquidated damages provisions, to achieve their business objectives. Similarly, public entities may advance proprietary goals by stating the terms and conditions pursuant to which they will (1) grant commercial entities the right to use the airport's own property, and (2) deal with third parties in a commercial context, including enforcement provisions. Whether a government action is subject to preemption depends on whether its purpose is regulatory or proprietary, not on the mere form of the action.

D. The Market-Participant Exception Reflects This Court's Holding That the Supremacy Clause Does Not Apply to Proprietary Conduct by Public Entities

Petitioners and their *amici* rely heavily on the assertion that the market-participant exception as applied by the Ninth Circuit is somehow "non-textual," A4A Br. at 15, and "untethered," ATA Br. at 22. But, this Court has long held, unanimously, that "pre-emption doctrines apply only to state regulation." *Boston Harbor*, 507 U.S. at 227. There is a "distinction between government as regulator and government as proprietor," *id.*; "[i]n the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction." *Id.* at 231-32.

Because the Supremacy Clause establishes the laws of the United States as supreme, state actions that are proprietary in nature are not implicated by the Supremacy Clause. Consistent with that principle, many express preemption clauses, including 49 U.S.C. § 14501(c)(1), limit their preemptive scope to state and local actions to "enact or enforce a law, regulation, or other provision having the force and effect of law. . . ." Such provisions, however, simply codify the inherent limit of the Supremacy Clause to displace state and local actions that are regulatory in nature. Whether described as a market-participant

exception or a proprietary powers exception, the principle that proprietary conduct by government entities is presumptively not preempted is firmly grounded in the purposes of the Supremacy Clause and tethered to Congressional intent.

In contrast, ATA reaches beyond the textual limits of the Supremacy Clause and the FAAA Act in an effort to limit the scope of unpreempted proprietary power by employing such non-textual concepts as "efficient procurement" to limit the market-participant exception to the buying or selling of goods or services. ATA Br. at 30; A4A Br. at 14. But "efficient procurement" is only one proprietary interest and is not itself mandated by the principles animating preemption, or by the preemption provision of the FAAA Act. That single concept should not be employed to define the applicability (or inapplicability) of preemption principles. As the Court noted in *Boston Harbor*, and as the United States appears to acknowledge, "[w]hen a State owns and manages property, it must interact with private participants in the marketplace." 507 U.S. at 227. That may include actions to ensure the swift and most efficient completion of a project. *Id.* at 232. Such conduct sweeps far broader than efficient procurement. Both public entities and their counterpart private companies advance proprietary interests by doing more than simply buying and selling. The scope of preemption is thus determined by asking whether a public entity "acts as a proprietor and its acts therefore are not 'tantamount to regulation' or

policymaking." *Id.* at 229. Courts simply discern when a public entity is advancing legitimate proprietary goals, thus bringing their actions within the market-participant exception.

The Ninth Circuit's decision correctly applies this Court's prior decisions and articulated principles. The Ninth Circuit applied a definition of "market participant" that sought to distinguish a municipal governmental entity's regulatory functions from its proprietary functions, precisely as the Court directed in *Boston Harbor*. *Compare Am. Trucking Ass'ns v. City of Los Angeles*, 660 F.3d 384, 401-02 (9th Cir. 2011) (analyzing proprietary purposes of the Port's actions and similarity to actions by private businesses) *with* 507 U.S. at 231-32. Because the Ninth Circuit followed this Court's clear precedent, the decision below should be affirmed.

CONCLUSION

For the foregoing reasons, ACI-NA respectfully urges the Court to affirm the Court of Appeals' decision.

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AMICUS CURIAE BRIEF

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AMERICAN TRUCKING ASSOCIATIONS, INC., *Petitioner*,

v.

CITY OF LOS ANGELES, ET AL., *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTEREST OF AMICI CURIAE

Amici, the States of California and Washington, own and operate, together with their political subdivisions, a wide variety of property-based facilities, such as hospitals, schools, airports, maritime ports, and state-owned office buildings, including the port at issue here. Many of these facilities contract for services that involve motor carriers, such as procurement services, refuse services, transport services, courier services, and the like.

Amici have a compelling interest in ensuring that states and their subdivisions have the flexibility and discretion they need to operate their facilities efficiently, and to implement measures to improve, expand, and modernize their facilities as needed. With respect to the issues in this case, Amici have a compelling interest in ensuring that their ports remain competitive and are able to expand and adopt new technologies to meet changing circumstances.

SUMMARY OF ARGUMENT

1. State and local governmental entities routinely enter into agreements for motor carrier services that, while impacting the "price, route, or service" of such carriers, do not have the "force and effect of law." Such agreements are not preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA), which textually excludes nonregulatory governmental conduct from the reach of its preemption provision. This Court's analysis of an analogous provision in the Airline Deregulation Act (ADA), upon which the FAAAA was modeled, supports this understanding of the FAAAA's scope, as does the relevant legislative

history. *See Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). Under Petitioner's view of the FAAAA, even when a state is acting in a purely proprietary capacity, as states often do with respect to their massive property-based holdings, it may be subject to restrictions that would not be imposed on a private commercial actor. This view is unworkable for the States and finds no support in the text of the FAAAA or the relevant case law.

2. The Port of Los Angeles's conduct in this case, *i.e.*, its insistence that motor carriers that perform drayage services on its property agree contractually to certain signage and parking requirements, does not have the "force and effect of law" and therefore is not preempted by the FAAAA. It is true that, in some circumstances, contractually imposed requirements may have a regulatory character. That is not the case here, as confirmed by several factors that this Court, in analogous circumstances, has previously recognized indicate proprietary or commercial (as opposed to regulatory) conduct. These include: the commercial character of the Port's business; the business interests that motivated the challenged signage and parking restrictions; and the business (rather than regulatory) methods employed by the Port to accomplish its purposes. The contrary analysis offered by Petitioner and the United States in this respect is flawed and incomplete.

ARGUMENT

I. THE FAAAA'S PREEMPTION PROVISION DOES NOT REACH PURELY PROPRIETARY OR COMMERCIAL CONDUCT THAT LACKS THE FORCE AND EFFECT OF LAW

Conduct by a state or its subdivisions that is proprietary in nature and that lacks the force and effect of law is exempt from the reach of the FAAAA's preemption provision. This conclusion follows from the text of the FAAAA itself, from this Court's precedent, and from the relevant legislative history. Petitioner's suggestion that the FAAAA preempts any conduct by a state, or its subdivisions, that relates to the "price, route, or service" of motor carriers is both textually unsupported and entirely impractical.

By its text, the FAAAA's preemption provision applies only to state or local conduct having the force and effect of law:

> [A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision *having the force and effect of law* related to a price, route, or service of any motor carrier . . . .

49 U.S.C. § 14501(c)(1) (emphasis added). A state hospital, for example, may contract for trucking services, and negotiate the time, price, and location of any pickups or deliveries to be performed under the contract, without running afoul of the FAAAA. Even though such contractual terms indisputably impact the "price, route, or service" of a motor carrier, they lack the force and effect of law, and therefore are not preempted.

Put another way, so long as a state or local entity is acting as a market "participant," rather

than a market "regulator," in its dealings for motor carrier services, its conduct is not preempted under the FAAAA. This distinction, known as the "market participation" doctrine, serves an important function under the FAAAA just as it does with respect to any other exercise of Congress's power under the Commerce Clause. It respects the need to protect federal lawmaking from impermissible state or local encroachment, while recognizing that states and their subdivisions often act in nonlawmaking capacities much as private entities do. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980) ("The basic distinction . . . between States as market participants and States as market regulators makes good sense and sound law."); *see also White v. Mass. Council of Constr. Emp'rs*, 460 U.S. 204, 206-08, 214-15 (1983); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976).

American Airlines Inc. v. Wolens, 513 U.S. 219 (1995) confirms this understanding of the FAAAA's preemption provision, as exempting state or local functions that are proprietary rather than regulatory in nature. At issue in *Wolens* was the scope of the preemption provision in the ADA upon which the FAAAA's preemption provision was modeled. Much like the FAAAA's preemption provision, the ADA's preemption provision "prohibits States from 'enacting or enforcing any law . . . relating to [air carrier] rates, routes, or services.'" 513 U.S. at 222 (quoting former 49 U.S.C. App. 1305(a)(1), codified as amended at 49 U.S.C. § 41713(b)). In *Wolens*, the Court held that this provision "bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves." *Id.* For this reason, the ADA did not preempt breach-of-contract claims brought by airline customers against

American Airlines based on changes to the airline's frequent flyer program. *Id.* at 228-33.

Significantly, the Court in *Wolens* explained that the phrase "having the force and effect of law" is "most naturally read to refer to binding standards of conduct that operate irrespective of any private agreement." 513 U.S. at 229 n.5 (internal quotes and citation omitted). Likewise, the identical phrase in the FAAAA should "naturally" be read to mean that agreements between public entities acting as market participants and private parties do not have the force and effect of law, and are therefore not preempted.

The relevant legislative history confirms that Congress sought specifically to target regulatory rather than proprietary conduct through enactment of the FAAAA's preemption provision. Congress found and declared, when it enacted this provision, that it was seeking to preempt "certain aspects of the State *regulatory* process" because "the *regulation* of intrastate transportation of property by the States" had created potentially conflicting requirements. FAAAA, Pub. L. No. 103-305, § 601(a), 108 Stat. 1569, 1605 (1994) (emphasis added). As a House Conference Report explained, the problem Congress faced was that "[c]urrently 41 jurisdictions *regulate* . . . intrastate prices, routes and services of motor carriers . . . . Typical forms of *regulation* include entry controls, tariff filing and price *regulation* . . . ." H. Conf. Rep. 103-677, at 86 (1994) (emphasis added). Thus, Congress sought to preempt "State *regulation* of prices, routes, and services of motor carriers." *Id.* at 85 (emphasis added).

The alternative view – that state and local governments' contractual agreements are preempted whenever they affect any "price, route, or service" of a trucking company – would be both textually

unsupported and harmful to the efficient, day-to-day operations of government. The State of California alone owns or manages hundreds of facilities, including office buildings, colleges, universities, laboratories, research centers, prisons, and hospitals.[1] Each of these facilities is serviced by numerous motor carriers transporting a variety of goods, including documents, office supplies, furniture, books, appliances, equipment, linens, medicine, and food. It would not be unreasonable for a state, in an effort to save costs, to impose measures that could affect carriers' "price, route, or service" statewide, such as requiring major deliveries in all of its facilities to be made only by appointment, or, as part of statewide furloughs, to close state office buildings, including their loading docks, one day per week or month. Yet Petitioner effectively invites the

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[1] For example, the California Department of General Services operates more than fifty office buildings. *See* List of DGS Buildings, http://www.dgs.ca.gov/resd/BuildingList.aspx (last visited Mar. 24, 2013). The California State University and University of California systems together encompass thirty-three campuses, each of which has numerous attendant facilities, including labs and research centers. *See* Cal. State Univ., Campus Websites, http://www.calstate.edu/search_find/campus.shtml (last visited Mar. 24, 2013); Univ. of Cal., UC Campuses, http://www.universityofcalifornia.edu/campuses/welcome.html (last visited Mar. 24, 2013). The California Department of Corrections and Rehabilitation operates more than thirty state prisons housing adult inmates, and additional facilities housing juveniles. *See* Cal. Dep't of Corr. & Rehab., Prison Facilities, http://www.cdcr.ca.gov/Facilities_Locator/index.html (last visited Mar. 24, 2013). The California Department of Mental Health operates five state hospitals throughout California. Cal. Dep't of Mental Health, State Hospitals: Home, http://www.dmh.ca.gov/services_and_programs/state_hospitals/Default.asp (last visited Mar. 24, 2013).

Court to construe the FAAAA's preemption provision in a manner that could reach such conduct, by focusing its analysis largely on the massive size of the facility (*i.e.*, the Port) and on the potential impact on "price, route, or service," while downplaying the express statutory requirement that preempted conduct have the force of law.

Petitioner's remaining arguments fail on their merits. Petitioner emphasizes, for example, that the FAAAA includes several express exceptions to preemption, but market participation is not among them. Pet. Br., at 25-26. However, there was no need for Congress to expressly carve out a market participation exception because the States' proprietary conduct does not fall within the FAAAA's preemption provision in the first place. Petitioners also point out that the ADA, upon which the FAAAA was modeled, was amended to include an express exception relating to the exercise of "proprietary powers" by state- or municipality-owned airports, which is absent from the FAAAA. Pet. Br., at 26-27 (citing 49 U.S.C. § 41713(b)(3)). But, as the United States explains, the new language was intended only to carry forward, "without substantive change," an earlier version of the statute that was merely clarifying in nature: "'Nothing in [the preemption provision] *shall be construed* to limit the authority of any State or political subdivision therefore . . . as the owner or operator of an airport . . . to exercise its proprietary powers and rights.'" Br. for U.S., at 18 (quoting ADA § 4, 92 Stat. 1707-1708 (49 U.S.C. App. 1305(b)(1) (1992))). That Congress took the step of making this clarifying point in one statute, but not the other, signifies no more than that the statutes involve different industries with different litigation histories. *See* Br. for L.A. Resp., at 25-26.

II. THE OBLIGATIONS IMPOSED BY THE PORT'S CONCESSION AGREEMENTS ARE COMMERCIAL AND PROPRIETARY IN NATURE AND LACK THE FORCE AND EFFECT OF LAW, AND THEREFORE ARE NOT PREEMPTED

Because the challenged obligations are commercially driven and contractually imposed, through concession agreements entered into by trucking companies seeking to do business on the premises of the Port of Los Angeles, they lack the force and effect of law and are not preempted. Bolstering this conclusion is the presence of several factors that this Court has identified in different, but analogous, contexts as indicating the commercial character of governmental operations. In arguing otherwise, Petitioner and the United States rely on an overly narrow description and incorrect application of the pertinent law.

As the United States explains, contractually imposed obligations may sometimes have a regulatory character and therefore be barred under the Commerce Clause and in other contexts. Br. for U.S., at 20. That is, not all contracts into which governmental entities enter constitute market participation, as distinct from market regulation. However, market participation will be found when an agency has "'act[ed] just like a private [entity] would act.'" *Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass.*, 507 U.S. 218, 233 (1993) (*Boston Harbor*).

The proprietary-versus-regulatory analysis will differ based on the context in which the case arises. In the present case, the key considerations are: (1) character of the business: whether the character of the governmental entity resembles a private business, *see Reeves*, 447 U.S. at 440, 442

(government-run cement plant); (2) purpose: whether the governmental entity is pursuing a business goal rather than a policy objective, *see Boston Harbor*, 507 U.S. at 228-29 (discussing *Wis. Dep't of Indus. v. Gould Inc.*, 475 U.S. 282, 286 (1986)); and (3) methods: whether the government "employs tools . . . that no private actor could wield" or instead uses methods resembling those of private businesses. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 438 F.3d 150, 157 (2d Cir. 2006), *aff'd*, 550 U.S. 330 (2007)). All point toward the same result here: that the parking and signage provisions are proprietary, not regulatory, in nature.

Character of the business. The structure and function of the Port more resemble a business entity than a governmental regulatory agency, which supports a conclusion that its actions are proprietary. The Port is an independent entity that must balance its own budget through commercial revenues rather than through taxes. Accordingly, its decisions must, like those of any other business, make business sense for it to prosper.

It is undisputed that the Port is structured and operates more like a private business than like a traditional governmental entity. It has autonomy over its business operations, and neither receives nor contributes to City tax revenues. Pet. App. 70a. Under the City Charter, the Port is a "Proprietary Department," and has separate "possession, management and control of all property and rights of every kind." L.A., Cal., City Charter §§ 600, 602. It may set its own fees and manage its own advertising and business development. Cal. Harb. & Nav. Code §§ 6305, 6308, 6370. Its revenues are segregated from other municipal funds and only may be used for Port purposes. L.A., Cal., City Charter § 656. Access

to the Port is controlled and not open to the public. *See* Br. for L.A. Resp., at 2, 60.

As an entity that must rely on its own business revenue, the Port is "'burdened with the same restrictions imposed on private market participants.'" Br. for U.S., at 20 (quoting *Reeves*, 447 U.S. at 439). The Port exists exclusively to provide a platform for commercial transactions, specifically, international, interstate, and intrastate trade, and it competes with other ports for that business. Thus, the Port is different in kind from governmental agencies that may engage in some market activity in order to further certain projects, but whose overall goals are regulatory. While much is made in the papers regarding the size of the Port, its size is necessary for the Port to conduct its specialized business. Here, the Port's size reflects, rather than belies, its essential commercial nature.

Commercial objective rather than regulatory purpose. The challenged conduct is driven by commercial considerations, rather than to achieve regulatory objectives, which also indicates that the Port's conduct is proprietary rather than regulatory. The Port entered into the agreements with drayage truck operators as part of its effort to modernize and expand its operations, and thereby remain competitive. The Port advertises the quality of the "drayage trucks" at its facility and its "[c]apacity to grow as needs require," along with its deep draft berths that can accommodate "the world's largest cargo vessels," its storage space, and other facilities.[2] It advertises these features in order to persuade businesses to use the Port for their shipping needs.

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[2] Port of L.A., The LA Advantage, http://www.portoflosangeles.org/pdf/LA_Advantage_Brochure.pdf (last visited Mar. 21, 2013).

The pre-contract drayage services, by contrast, posed safety, security and reliability concerns, and ultimately halted the Port's expansion due to litigation, in part, over drayage pollution. *See* Pet. App. 85a-88a, 94a-95a. The Port therefore either had to improve the situation or risk the loss of future clients and business. Indeed, the Port has acted no differently from other ports, which also have taken steps to reduce pollution in drayage services as part of their business strategies, and to deny access to non-complying trucks.[3]

That the Port considered the concerns of its neighbors in connection with the concession agreements also represents good business practices. *Shlensky v. Wrigley*, 237 N.E.2d 776, 780 (Ill. Ct. App. 1968) (directors of baseball stadium acted in corporation's "best interests" when considering the impact of proposed investment on the quality-of-life in the surrounding neighborhood); *see* Br. for U.S., at 24 (acknowledging that the concession agreements "were designed specifically to generate goodwill among local residents" which may be "an objectively reasonable business interest" (citations omitted)). In this case, the Port's approach is commercially strategic because neighborhood opposition previously had stymied the Port's expansion plans. Pet. App. 75a-79a.

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[3] *See, e.g.*, Port Auth. of N.Y. & N.J. Drayage Truck Registry Program, http://www.panynj.gov/truckers-resources/dtr.html (last visited Mar. 14, 2013); Port of San Diego Green Port Clean Air Program, http://www.portofsandiego.org/environment/green-port.html (last visited Mar. 14, 2013); Port of Long Beach Clean Trucks Program, http://www.polb.com/environment/cleantrucks/default.asp (last visited Mar. 10, 2013); Port of Seattle Green Gateway Program, http://www.portseattle.org/Environmental/Air/Pages/default.aspx (last visited Mar. 14, 2013).

Business methods rather than regulatory methods. The methods by which the Port seeks to achieve its purposes – concession agreements with drayage truck operators that are limited in scope, and strategic expenditures of revenue – are characteristic of business conduct rather than of governmental regulation.

The concession agreements are tailored, both temporally and geographically, to serve the Port's business interests, and are characteristic of those that a private business may employ. They apply only to truck operations in the Port and in its immediate vicinity. They therefore cover the drayage submarket within "a discrete, identifiable class of economic activity" – port operations – in which the Port is a participant on an ongoing basis, and do not improperly seek to impact, through a ripple effect or otherwise, the conduct of nonsignatory entities, such as downstream purchasers of products that move through the Port. *White*, 460 U.S. at 211 n.7; *see South-Central Timber Dev't, Inc. v. Wunnicke*, 467 U.S. 82, 96-99 (1984) (plurality opinion).

Next, the Port has "expend[ed] only its own funds" on the Port's drayage operations, which is characteristic more of market participation than regulation. *White*, 460 U.S. at 214. Accompanying the concession agreements at issue were Port expenditures of more than $56 million to subsidize the private purchase of newer, safer, and cleaner drayage trucks. Pet. App. 90a-91a. Much like the state subsidies providing for clearing automobile hulks upheld in *Hughes*, 426 U.S. at 809, these subsidies ensure that drayage services at the Port serve the Port's commercial interests.

Finally, the concession agreements are enforceable only by traditional contract remedies for breach, rather than by criminal penalties. *See* JA 73-

83. Petitioner and the United States, in arguing to the contrary, emphasize that the Harbor Tariffs, to which Port tenants – the cargo terminal operators – must agree, do carry criminal penalties for noncompliance. JA 84-86, 105-06. But the motor carriers conducting drayage are not bound by the Harbor Tariffs, and therefore are not subject to their penalties. And, in any event, the Harbor Tariffs can achieve no more than any private business entity could: they require all invitees to commit to certain conditions as a condition of entering and doing business on Port property. Like any private business, the Port may seek criminal prosecution of those who enter on its property without authorization. *See* Br. for L.A. Resp., at 60. Indeed, the penalties the Tariffs impose for unauthorized use of Port facilities are identical to those imposed for trespass on private property. *Compare* JA 84 *with* Cal. Penal Code §§ 19.2, 602.

In arguing that the methods the Port has employed are characteristic of regulation, the United States emphasizes the temporal scope of the concession provisions, *i.e.*, that they "permanently cover all drayage-service providers that wish to gain access to the Port." Br. for U.S., at 23-24. But the fact that a contractual requirement, which is appropriately tailored to a governmental agency's "ongoing" commercial interests, happens itself to be ongoing does not somehow render it regulatory. *See Wunnicke*, 467 U.S. at 99. Many commercial agreements for ongoing services are open ended, including contracts for refuse hauling, landscaping, equipment repair, and building maintenance and cleaning. The United States also points out that the Port does not itself consume drayage services. However, the Port need not directly consume drayage for the concession agreements to be valid; the

agreements do not reach beyond the market in which the Port engages in economic activity.

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In short, the Port of Los Angeles imposed signage and parking requirements through concession agreements with motor carriers for drayage services because it made good business sense to do so. As the concession agreements are individually contracted, tailored to the Port's business, and lack the force or effect of law, they do not fall within the FAAAA's preemption provision.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Dated: March 25, 2013

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AMICUS CURIAE BRIEF

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In the

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AMERICAN TRUCKING ASSOCIATIONS, INC.,
Petitioner,

v.

CITY OF LOS ANGELES, CALIFORNIA, ET AL.,
Respondent.

On Writ of Certiorari To The
United States Court of Appeals for the Ninth Circuit

Brief For California Construction Trucking Association as Amicus Curiae Supporting Petitioner

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INTEREST OF AMICUS CURIAE[1]

The California Construction Trucking Association ("CCTA") is a nonprofit trade association that represents nearly 1,000 construction industry related trucking companies ranging in size from 1 truck to over 350 trucks whose business constitutes over 75% of the hauling of dirt, rock, sand, and gravel operations in California. The mission of CCTA is to advance the professional interests of construction trucking companies in California. The vast majority of members are motor carriers as that term is defined in 49 U.S.C. §13102. Materials hauled by members include dirt, sand, rock, gravel, asphalt and heavy equipment. CCTA members typically transport construction material from aggregate plants, asphalt and cement plants to construction sites. Dirt is primarily hauled from a barrow or construction site to another construction site.

CCTA advocates on behalf of its members, all of whom have a strong interest in motor carrier regulations generally.

A substantial amount of the work performed by CCTA members is on large construction projects, including the construction of freeways, dams,

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office in conjunction with the certificate of service.

bridges, and other large-scale infrastructure projects. These projects typically involve the investment of public funds from various federal, state and local sources. Despite the involvement of state and local government in these projects, CCTA members generally enjoy protection from state and local regulation conferred by 49 U.S.C. § 14501(c)(1).

Because this case may determine the existence and scope of a "market participant" exception to preemption in the motor carrier context, CCTA has an interest in ensuring that any exception allows its members to continue doing business in a commercially reasonable manner, without the excessive state and local regulation that Congress intended to preempt.

SUMMARY OF ARGUMENT

This case involves an interpretation of the preemptive scope of 49 U.S.C. § 14501(c)(1), and specifically whether there is an unexpressed "market participant" exception to preemption. While such an exception may exist, the exception is limited to situations in which the state or local government is truly acting like a traditional private actor in the relevant market, and is not available when state and local governments are acting in their traditional governmental capacities.

The market participant exception grew out of the "negative" or dormant commerce clause cases, in contexts where Congress had been silent on a particular topic. Other commerce clause case law instructs that Congress can regulate private

commerce in such an extensive manner that there is no market participant exception. This case presents a situation where Congress has taken an intermediate step, by neither remaining silent, nor completely prohibiting all state regulation.

In such cases, the existence and scope of a market participant exception depends on the precise language Congress uses in expressing its preemptive intent, as well as the type of market activity in which the state and local government is purportedly engaged. CCTA submits that the market participant exception is too narrow to save the Port's concession agreements in this case from preemption.

ARGUMENT

I. CONGRESS HAS DEREGULATED THE MOTOR CARRIER INDUSTRY

This Court has recognized that the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") "generally preempts state and local regulation 'related to a price, route, or service of any motor carrier ... with respect to the transportation of property.'" *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 429 (2002) (*"Ours Garage"*). Specifically, the FAAAA provides:

> "(1) General Rule. Except as provided in paragraphs (2) and (3), a State [or] political subdivision of a State ... may

> not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... with respect to the transportation of property."

49 U.S.C. § 14501(c)(1). The FAAAA uses language virtually identical to the Airline Deregulation Act of 1978 ("ADA"). *Rowe v. New Hampshire Motor Transport Ass'n.*, 552 U.S. 364, 370 (2008). That Congress had a "deregulatory purpose" has never been doubted. As this Court previously observed:

> "Congress intended to encourage market forces ... through the elimination of a myriad of complicated and potentially conflicting state regulations," the court observed; "yet another level of regulation at the local level," the court inferred, "would be disfavored."

Ours Garage, supra, 536 U.S. at 431, quoting *Petrey v. Toledo*, 246 F.3d 548, 563 (2001). In enacting the FAAAA, Congress made a specific finding that "the regulation of intrastate transportation of property by the States has [] imposed an unreasonable burden on interstate commerce." H.R. Conf. Rep. No. 103–677, p. 39, 1994 U.S. Code Cong. & Admin.News 1994, p. 1715 (hereinafter H.R. Conf. Rep.). Moreover, the conference report observed that

> Despite the movement toward deregulation by some individual states, the conferees believe preemption legislation is in the public interest as well as necessary to facilitate interstate commerce. State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets.

H.R. Conf. Rep. at p. 87. These affirmative statements by Congress leave no doubt that the FAAAA was enacted pursuant to Congress' authority under the Commerce Clause.

This case presents the question of whether there is a "market participant" exception to the preemption provisions of the FAAAA. In order to answer that question, it is necessary to briefly review the origination of the "market participant" exception in other contexts arising out of the Commerce Clause.

II. THE SCOPE OF STATE AND LOCAL POWER DEPENDS ON THE NATURE OF CONGRESS' ACTION UNDER THE COMMERCE CLAUSE

Under the Commerce Clause of the United States Constitution, there are three principal ways in which Congress may act so as to limit the authority of state and local governments. First,

Congress may decline to regulate an area at all. In such cases, the jurisprudence of the dormant commerce clause defines the scope of state power in the area of regulating commerce. Second, Congress can expressly regulate an industry. In such cases, the power of state and local governments is severely restricted. Third, and as relevant to this case, Congress may deregulate, by prohibiting state and local government from regulating an industry. In such a case, where Congress has neither remained completely silent, nor have they completely regulated the industry themselves, the scope of power remaining to the states depends on the precise prohibitions Congress has enacted. A brief examination of the first two types of actions helps illuminate the mode of analysis for the third type.

A. Under the Dormant Commerce Clause, State Power Is Impliedly Limited Even in the Absence of Congressional Action

The Commerce Clause provides that "Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const., Art. I, § 8, cl. 3. This Court's "negative" or "dormant" Commerce Clause jurisprudence "grew out of the notion that the Constitution implicitly established a national free market. . . ." *Wyoming v. Oklahoma* 502 U.S. 437, 469 (1992). This Court has repeatedly relied on "some form of the incantation that 'the very purpose of the Commerce Clause was to create an area of free trade among the several States ... [and the Clause] by its own force created an area of trade free from interference by the States.'" *Id.*, at

470, quoting *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 402–403 (1984).

The text of the Commerce Clause is an affirmative grant of authority to Congress and does not expressly limit the power of the States. Nevertheless, this Court has "long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 339 (2007).

B. The "Market Participant" Exception Evolved out of the Negative Commerce Clause Jurisprudence

The precise legal standards for evaluating the limits of state authority under the negative commerce clause are beyond the scope of this brief,[2] but over the years, an exception to the implied limits of state authority has been developed. "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap Corp.*, 426

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[2] Compare *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*, 511, US 93, 99 (1994) (laws which discriminate against interstate commerce are virtually per se invalid) with *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (nondiscriminatory laws will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits).

U.S. 794, 810 (1976). This doctrine has become known as the "market participant" exception to the negative commerce clause. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999).

In first announcing the exception, this Court took pains to point out in a footnote that it expressed no view on whether Congress could, by affirmatively legislating, prohibit State market activity. Rather, this Court stated "this case involves solely the restrictions upon state power imposed by the Commerce Clause when Congress is silent." *Hughes v. Alexandria Scrap Corp., supra*, 426 U.S. at 810, fn. 19. Thus, the "market participant" exception was, at least initially, limited to situations where Congress had not affirmatively acted.

C. Congress May Preempt State Power Entirely Using Its Authority under the Commerce Clause

In contrast to situations in which Congress is silent, "a valid act of Congress, enacted pursuant to its Commerce Clause powers seeking to regulate a particular area, is the supreme law of the land and preempts state laws or regulations that conflict" with it. *Strahan v. Coxe*, 127 F.3d 155, 167 (1st Cir. 1997), internal quotations and citations omitted. This Court has identified "[a] wealth of precedent" establishing that Congress has "authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law." *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.* 452 U.S.

264, 290 (1981). This Court long ago recognized that "[i]t is elementary and well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive." *Missouri Pacific R. Co. v. Stroud*, 267 U.S. 404, 408 (1925). Consistent with that view, "it is clear that the Commerce Clause empowers Congress to prohibit all-and not just inconsistent-state regulation of such activities." *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc., supra,* 452 U.S. at 290.

Moreover, when Congress acts to completely regulate an industry or activity, there is no market participant exception:

> we think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity. . . . The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. The power of a state to fix intrastate railroad rates must yield to the power of the national government when their regulation is appropriate to the regulation of interstate commerce.

United States v. California, 297 U.S. 175, 183-84 (1936). Thus, where Congress acts pursuant to its authority under the Commerce Clause, and prescribes laws for all economic actors, no "market participant" theory can exempt states from the Congressional statute. This follows logically from the fact that under the Commerce Clause, Congress can not only regulate the economic activity of private actors, see e.g. *New York v. United States*, 505 U.S. 144, 167 (1992), but may also expressly negate the power of the states. *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc., supra*, 452 U.S. at 290. Since the commerce clause power is so broad, it matters not whether the state is acting in its sovereign governmental capacity, or in its private, proprietary, "market participant" capacity. Either way, the state's power is subordinate to Congress' enactments.

D. Congress May Choose an Intermediate Course by only Partially Preempting State Authority

As explained above, when Congress is silent, states retain "a residuum of power" to enact laws which may affect, or even regulate, interstate commerce. *Hughes v. Alexandria Scrap Corp., supra*, 426 U.S. at 830. Alternatively, Congress may completely preempt all state authority by engaging in encompassing federal regulation of an industry or activity. However, Congress may instead take an intermediate step, as in this case, by neither remaining silent, nor thoroughly regulating the motor carrier industry. Under the FAAAA, and later the ICC Termination Act of 1995, Congress

prescribed some rules for motor carriers,[3] but primarily announced that State authority was preempted when it came to laws related to the prices, routes, or services of motor carriers. 49 U.S.C. § 14501(c)(1).

The foregoing establishes that a "market participant" exception exists when Congress is silent, and that exception can be eliminated when Congress takes broad, all-encompassing action. Thus, it is apparent that whether a "market participant" exception exists in intermediate cases necessarily depends on the language Congress uses in taking the intermediate step between no action and complete preemption. In this case, Congress has declared that states "may not enact or enforce a law, regulation, or other provision having the force and effect of law" related to prices, routes or services. 49 U.S.C. § 14501(c)(1). That language is critical in assessing whether there is any market participant exception to the express preemption provision.

E. The Market Participant Exception Is Generally Limited to Situations in Which State and Local Governments Act in a Private or Proprietary Capacity

Before analyzing the language of the FAAAA to determine whether a "market participant" exception exists, it is first necessary to understand

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[3] See, e.g., 40 U.S.C. §14101 et seq.

the limits of the exception as articulated by this Court in prior cases.

Shortly after the "market participant" exception was announced by this Court in *Hughes v. Alexandria Scrap Corp., supra*, 426 U.S. at 810, this Court expounded on the principle. In *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), this Court explained that the basic distinction between States as market participants and States as market regulators is based on the fact that "the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace." *Id.*, at 436-437. This Court noted that there was "no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Id.*, at 437. The decision also provided a concrete example of a situation in which the state is operating in one capacity as opposed to the other. In *Reeves*, this Court held that "when a State chooses to manufacture and sell cement, its business methods, including those that favor its residents, are of no greater constitutional concern than those of a private business." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 277 (1988), citing *Reeves, Inc. v. Stake, supra*, 447 U.S. at 438-439.

In *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984) a plurality of this Court refined the limits of the "market participant" exception. In *Wunnicke*, Alaska entered into a contract to sell state-owned timber, but a provision of the contract required the purchaser to partially process the timber inside Alaska before shipping it out of state. *Id.*, at 84. Although Alaska had

entered the timber market as a seller, the plurality opinion concluded that "[t]he market-participant doctrine permits a State to influence 'a discrete, identifiable class of economic activity in which [it] is a major participant.'" *Id.*, at 97, quoting *White v. Massachusetts Council of Construction Workers, Inc.*, 460 U.S. 204, 211, n. 7 (1983). To drive the point home, this Court noted:

> The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further.

South-Central Timber Development, Inc. v. Wunnicke, supra, 467 U.S. at 97. Although Alaska had entered the timber selling market, it had not entered the timber processing market, and its attempt to regulate the downstream processing of the timber it sold exceeded the permissible scope of the market participation exception. *Id.*, at 98-99.

Subsequently, in *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould Inc.*, 475 U.S. 282 (1986) this Court shed some more light on the distinction between private action and governmental action. In holding that Wisconsin's statute that debarred NLRA violators from securing any state procurement contracts, this Court noted that "government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints." *Id.*, at 290. Moreover, this Court observed that Congress

> treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play.

Ibid. This observation is critical because the unique roles and responsibilities of state and local government can determine whether a state is participating in the market in the same manner as a private entity, or is simply fulfilling its traditional responsibilities as a governmental entity. Thus, it must always be remembered that the market participant "doctrine differentiates between a State's acting in its distinctive governmental capacity, and a State's acting in the more general capacity of a market participant." See *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 592 (1997).

III. THE LANGUAGE OF 49 U.S.C. § 14501(C)(1) LIMITS THE SCOPE OF STATE AND LOCAL ACTIVITY THAT IS EXCEPTED FROM PREEMPTION

Because the FAAAA does not preempt all state action with respect to motor carriers, it is possible that a "market participation" exception could coexist with the intent of Congress. However, that exception would have to be narrowly construed in light of the language Congress used in the express preemption provision. By prohibiting states from enacting or enforcing any "law, regulation, or

other provision having the force and effect of law" related to prices, routes or services of motor carriers, Congress used fairly broad language. 49 U.S.C. § 14501(c)(1). In *Morales v. Trans World Airlines*, 504 U.S. 374, 385-386 (1992), this Court determined that the preemptive sweep of the language was to be broadly construed to effectuate Congress' intent.

Under the reasoning of the plurality in *Wunnicke*, it is clear that a state may engage in preempted conduct not merely by passing laws, but also by insisting on certain contractual provisions that "have the force and effect of law." It is therefore critical that the focus be on the substance of the state's action, rather than its form. If the State is truly acting like a private entity, or in a proprietary fashion, then the market participant exception may well apply. However, if the State is performing a traditional responsibility of government, or is acting in a distinctively governmental capacity, it cannot truly be said to be acting as a "market participant," even if the action bears some attributes of private commercial activity (like entering into a contract).

By way of example, if a state government undertakes to build a new statehouse, in which it will provide offices for state elected officials and staff (i.e. its own employees), then it is acting in a proprietary capacity. This is so because it is common in the private real estate development industry for an owner to procure the design and construction of a building for its own use. In building the statehouse for its governmental officials, the state is not undertaking to provide free office space to the general populace. Rather, it is

acting in much the same way as a private company would in building its corporate campus. As such, in contracting to build the statehouse, the state should be free to insist on whatever restrictions that a private owner could legally impose.

On the other hand, when a state government undertakes to build a freeway, which by definition is expressly for the benefit of and use by all citizens, and not merely state employees, it is not behaving in the traditional proprietary capacity. Private owners do not generally expend substantial capital for the benefit of strangers, or the public at large. That is a trait found exclusively in government, and as such, it is a traditional and distinctly governmental function.

Moreover, the construction of freeways and other large infrastructure projects do not generally lend themselves to a private market participant analysis. Precisely because such projects are so enormous, it is generally unrealistic for private enterprise to even have the capital to undertake such projects. Moreover, while infrastructure projects may generally promote the public good, most are not likely to generate a profit. For all those reasons, the public construction of freeways, dams, bridges, ports, and other large public works projects do not readily lend themselves to a private market analysis. When a state engages in such projects, even though it may technically contract with construction firms to do the work, it is not "participating in the market" in the sense contemplated by the Commerce Clause cases, because outside of the state action, there is no analogous market. As Justice Stevens recently

observed, "if a State merely borrows money to pay for spending on transportation, public safety, education, utilities, and environmental protection, it does not operate a commercial enterprise for purposes of the dormant Commerce Clause." *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 358 (2008) (conc. Opn. Stevens, J.) (internal quotations and citations omitted).

Quite the opposite, because the state is the only entity capable of even generating a "market" for large infrastructure projects, any rules, contractual provisions, or policies it promulgates in connection with those projects essentially have the force and effect of law, because they, by definition, regulate all of the participants in that market. To put it another way, if a construction firm does not like a particular contractual provision related to the construction of a bridge, the firm cannot simply decline the work and go build another bridge; in a practical sense, the state is the only source for bridge-building contracts, and thus the state's contractual provision operates the same way a statute would: it effectively applies to all participants in the market.

The logical conclusion must therefore be that before a state or local government can claim the "market participant" exception to preemption in the context of the FAAAA express preemption provision, it must demonstrate that the substance of its regulation is analogous to truly private commercial activity, such that by insisting on its regulation, it does not create a de facto law for the entire industry or market in which it is participating.

IV. THE MARKET PARTICIPANT EXCEPTION TO THE FAAAA, IF IT EXISTS AT ALL, DOES NOT SAVE THE PORT'S CONCESSION AGREEMENTS FROM PREEMPTION

In this case, the record below established that "[t]he Port develops terminal facilities and then leases those facilities to shipping lines and stevedoring companies." *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384, 391 (9th Cir. 2011). This fact is important because it defines the limited scope of the port's proprietary function. The port, to the extent it is participating in any market at all, is in the market of leasing port property to shipping companies. The drayage operators, however, contract with the shipping lines to "move cargo from marine terminals at the Port (where shipping companies unload containers) to customers, railroads, or other trucks for long-distance transport." *Id.*, at 390, fn. 1. Thus, it is apparent that the drayage operators do business directly with the shipping companies who lease the port property.

The relationship is similar to that of a convenience store that leases its premises from a private real estate magnate, and then does business with various suppliers who deliver goods to the store so that it can stock its shelves. In both situations, there is a landlord tenant relationship (between the real estate magnate and the store owner, and between the port and the shipping companies), and there is a separate business in which a motor carrier provides services to the tenant. In both cases, the motor carrier has no relationship whatsoever with

the landlord. As a general matter, there is no traditional "market" for landlords to participate in when it comes to the businesses that provide services to their tenants. While it is true, that landlords may impose some restrictions on their tenants and the types of business they conduct, it is fallacious to suggest that there is some real marketplace in which landlords and businesses providing services to the landlord's tenants interact in any meaningful, free-market capacity. That market never existed until the port established the concession agreements. Just like in *Wunnicke*, the port is regulating aspects of an industry that is "downstream" from the only real market in which it is participating, i.e. that of leasing property.

Moreover, the nature of the specific provisions of the concession agreements reinforces the fact that the port is acting in a regulatory capacity and not like a private market participant. For example, the off-street parking provision

> requires concessionaires to submit for approval "an off-street parking plan that includes off-street parking locations for all Permitted Trucks" and requires concessionaires to ensure that Permitted Trucks are "in compliance with parking restrictions by local municipalities."

American Trucking Ass'ns, Inc. v. City of Los Angeles, *supra*, 660 F.3d at 394. But this type of regulation is akin to a zoning ordinance which is a quintessential governmental function. Private

actors in the market do not generally seek to ensure their business partners comply with local parking restrictions or other zoning restrictions. If the partner fails to comply, he may face fines or other legal issues with the local jurisdiction, but that is of no concern to the person with whom he is contracting. Similarly, the placard provision

> requires concessionaires to "post placards on all Permitted Trucks" when the trucks are "entering and leaving Port Property and while on Port Property." The placards shall "refer[ ] members of the public to a phone number to report concerns regarding truck emissions, safety, and compliance to the Concession Administrator and/or authorities."

Id., at 394. On its face, this provision is aimed at benefitting the public at large, by giving them a means to report their concerns about any perceived truck deficiencies. As discussed previously, private market participants generally do not expend time and resources benefitting the public at large; that is a task unique to government.

Because both provisions impose a duty that is generally only imposed by governmental entities, the provisions "have the force and effect of law" within the meaning of 49 U.S.C. 14501(c)(1). Accordingly, they fall within the express preemption clause and cannot be saved by any market participant doctrine.

Finally, the field in which the regulations are being imposed is one that is quintessentially a public, governmental area of concern. The port "handles more shipping container and cargo volume than any other port in the country." *American Trucking Ass'ns, Inc. v. City of Los Angeles*, *supra*, 660 F.3d at 391. It is undeniably a large commercial interchange between land and sea transport. In effect, it is the largest "freeway interchange" in the country, where commerce transitions from the waterways to overland routes. This type of public infrastructure project is one that benefits the entire state, if not the country, by allowing the free flow of goods into the country from overseas, and likewise facilitates the export of American-made products into the international stream of commerce. Like the regulation of a freeway, or a bridge over a waterway, regulation of the ports is a traditional governmental function. As such, it cannot be said that the port is participating in the market as a private entity, because there simply is no analogous private market; the port *is the market*, and its rules and regulations have the force and effect of law.

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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February 22, 2013

AMICUS CURIAE BRIEF

MOTION FILED

FEB 2 2 2013

RECORD
AND
BRIEFS

No. 11-798

In the

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Petitioner,

v.

CITY OF LOS ANGELES, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND HARBOR TRUCKING ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

Amici Center for Constitutional Jurisprudence and Harbor Trucking Association have received consent to file this amicus brief from Petitioner American Trucking Association and Respondents Port of Los Angeles, *et al.* but Respondent Natural Resources Defense Council has declined to respond to several requests for consent thus necessitating this motion. Letters of consent from Petitioner and the Port of Los Angeles have been lodged with the Clerk of this Court.

Amicus Harbor Transportation Association is vitally interested in the regulations at issue in this case. Members of the association own drayage trucking companies that provide drayage services that dock at the Port of Los Angeles. These are the companies that, though they do no business with the Port are the target of the regulations at issue.

Amicus Center for Constitutional Jurisprudence is also keenly interested in this matter. The Center seeks to restore the principles of the American Founding to their rightful and preeminent authority in our national life. Among other things, the Center is vitally interested in the constitutional structure that defines a specific role for the federal government. Although the Center is most often active in those cases where the federal government has overstepped the bounds of its role, federalist structure also requires that state and local governments be prohibited from exceeding their power under the federal structure.

WHEREFORE, the Center for Constitutional Jurisprudence seeks leave to file the accompanying brief amicus curiae in support of petitioner.

DATED: February, 2013.

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QUESTION PRESENTED

1. Is there a generalized "market participant" exception to the Supremacy Clause of the United States Constitution?

2. Is a municipal government a "market participant" when it purchases no goods or services and otherwise has no participation other than the management of public property?

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IDENTITY AND INTEREST OF AMICI CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is the public interest law arm of the Claremont Institute. The mission of the Claremont Institute and the Center are to restore the principles of the American Founding to their rightful and preeminent authority in our national life. In addition to providing counsel for parties at all levels of state and federal courts, the Center participated as amicus curiae before this Court in several cases of significance addressing constitutional structure, including *American Electric Power Co. v. Connecticut*, __ U.S. __, 131 S.Ct. 2527 (2011); *Bond v. United States*, __ U.S. __, 131 S.Ct. 2355 (2011); *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); and *United States v. Morrison*, 529 U.S. 598 (2000). The Center is vitally interested in the constitutional structure of government that defines a specific role for the federal government. Although the Center is most often active in those cases where the federal government has overstepped the bounds of its role, federalist structure also requires that state and local governments be prohibited from exceeding their power under the federal structure. The Constitution unquestionably assigns regulation of commerce between states and with foreign nations to Congress and establishes that

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

congressional enactments under that power are the "supreme law of the land."

Harbor Trucking Association is a nonprofit 501(c)(6) organization that focuses on best practices in the drayage industry. Its members include Licensed Motor Carriers that move cargo from the ports, including the Port of Los Angeles, as well as cargo owners that use the drayage system. The HTA is one of the leading industry groups in the intermodal transportation business. Its members are directly impacted by any and all tariff changes, policy decisions, and rate increases that take place at both the Port of Los Angeles and Port of Long Beach.

Many of the Licensed Motor Carriers that belong to HTA work with independent contractor truckers to move the cargo from the port. These Licensed Motor Carriers take on the obligation of obtaining the necessary regulatory permits from the United States Department of Transportation for a truck to operate. The Licensed Carriers will also take responsibility for the administrative requirements of working with the Port, the Department of Transportation, the California Highway Patrol, and other regulators. The Licensed Carriers may purchase the trucks to move the cargo and lease them to the independent contractors. This allows the owner-operators to continue to work in a legal environment of increasing regulation including rules that require ever more expensive pollution control technology.

Neither the Licensed Motor Carriers nor the owner-operator truckers that work with them do business with the Port of Los Angeles. Instead, the Carriers contract directly with shipping companies (or the purchasers of the cargo) to move cargo from

the Port to customers or to the next point of transportation in the cargo's journey. The Port has no need to hire the members of HTA because the Port has no cargo to transport.

HTA members generally work with owner-operators — truck drivers that own their own equipment. The vast majority of drayage companies working at the Port use this business model in which low barriers to entry create intense competition among the carriers for business. Small businesses are allowed to flourish in this environment. It is an environment where, until the regulations at issue were enacted, competitive market forces could be counted on to produce lower rates and better service. *See Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 371 (2008).

In HTA's experience, the truck owner-operators favor this arrangement over an employer-employee model. The owner-operator model allows the truckers more freedom to set their own schedule and also allows them to make more money than employee-drivers. Bill Sharpsteen, *The Docks* 179 (University of California Press, 2011). Without the owner-operator model, most of the smaller Licensed Carriers would not be able to compete in this market.

As set forth in John E. Husing, et al., *San Pedro Bay Ports* Clean *Air Action Plan, Economic Analysis, Proposed Clean Truck Program* (Sept. 7, 2007) (Husing)[2], a purpose of the regulations at issue

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[2] The Husing Report was commissioned by the Ports of Los Angeles and Long Beach to study the impact of the Ports' Clean Truck Program. The report is posted on the Port of Los Angeles' web site at http://www.portoflosangeles.org/ctp/CTP_Full_Report_Sept72007.pdf.

is to put the members of HTA out of business in order to attract national trucking lines to take over drayage services at the port. To accomplish this purpose, the Port is working to end the entrepreneurial competition that is the hallmark of the drayage industry at the port.

SUMMARY OF ARGUMENT

The Port of Los Angeles is a local government agency that manages the public trust for navigation over tidelands in Los Angeles. The Port leases dock and storage space to shipping companies bringing goods to the United States from around the world. The Port has no business relationships, however, with the trucking companies providing drayage services to the shippers. Nonetheless, the court below ruled that the Port could regulate trucking companies in a manner prohibited by 49 U.S.C. §14501, a federal statute that expressly preempts the Port's regulations on the theory that the Port is a mere market participant. The Port, however, regulates as a government agency and does not buy, sell, or even use drayage services provided by the trucking companies that are subject to the regulations at issue. In no sense of the term is the Port a "market participant."

In any event, the market participant doctrine is a creature of this Court's "Dormant Commerce Clause" jurisprudence, meant to counteract some of unforeseen impacts of that judicially created rule. It has no place in cases where preemption is based on the Supremacy Clause of Article VI.

ARGUMENT

I. THE PORT OF LOS ANGELES IS NOT A MARKET PARTICIPANT

The Port of Los Angeles is on tidelands of the State of California. *American Trucking Associations. Inc. v. City of Los Angeles*, 559 F.3d 1046, 1049 (9th Cir. 2009) (*ATA I*). These tidelands have been granted to the City of Los Angeles, but the city only holds the property in trust for the benefit of the people of the State of California. *Id.* California gained title to its tidelands at statehood, "not in its proprietary capacity but as trustee for the public." *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 521 (Cal. 1980). Under the public trust doctrine, tidelands are held in trust for the public for navigation, commerce, and other public purposes. *Id.*; *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 435 (1892). The grant of the tidelands to the City of Los Angeles for the Port was subject to this trust. *See Zack's, Inc. v. Sausalito*, 165 Cal. App. 4th 1163, 1176-77 (2008); *Illinois Cent. R.R.*, 146 U.S. at 453-54. Indeed, the State of California has no power to alienate the tidelands of the state free of the public trust for navigation and commerce. *See Ward v. Mulford*, 32 Cal. 365, 372 (Cal. 1867); *People v. California Fish Co.*, 166 Cal. 576, 588 (Cal. 1913); *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 484 (Cal. 1970).

This Court noted in 1873 that the state's sovereignty over this land was subject "to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States." *Weber v. Bd. of Harbor Comm'rs*, 85 U.S. 57,

65-66 (1873). This public trust ownership of tidelands has existed since the founding of this nation.

> [W]hen the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the constitution to the general government.

Martin v. Lessee of Waddell, 41 U.S. 367, 410 (1842).

This Court emphasized these restrictions on public trust properties in *Illinois Cent. R.R.*. At issue in that case was the ownership of land beneath Lake Michigan that the railway contended it owned by reason of a grant from the state. The Court conceded that, under the equal footing doctrine, Illinois gained title to the lands under *navigable* waters in the state upon admission to the state. 146 U.S. at 434-35. That title, however, was not the same as title to upland property. "It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Id.* at 452. Even if the state transfers title, it still has a trust responsibility. "The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property." *Id.* at 453.

There is no dispute that when Los Angeles was granted this property for construction of the port, it

was a grant that was subject to the public trust. Los Angeles is required to *hold* this property for the benefit of the public for navigation and commerce, among other purposes. These public trust purposes are at the heart of the use of the tidelands for a commercial port. That fact establishes not only that the Port is complying with its duties under the public trust, but also that when the City of Los Angeles uses the granted tidelands for a port—for navigation and commerce—it is engaged in a quintessential government function dating from the time of the revolution.

In this case, the city, as well as the state, stands as the trustee for the public to ensure that these tidelands are used in a manner consistent with the public trust. While the city can allow private parties to undertake *activities* consistent with the trust, there can be no doubt that when government does so it acts in the role of government. Indeed, it cannot act otherwise under the public trust doctrine. The state and the city hold this property for the public purposes of navigation and commerce. In this role, this city is no more a private actor than when it assesses private property for taxes, hires police and firefighters, or takes any other action pursuant to police power to act for the public safety, health, or welfare. *See Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 617-18 (1986); *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 95-96 (1984).

Amici do not dispute that the Port collects revenue from the shipping companies that use its facilities. As the court below noted, the Port is not supported by tax revenue. Instead it relies on fees and leases to finance its activities. *American Trucking*

Associations, Inc. v. City of Los Angeles, 660 F.3d 384, 391 (9th Cir. 2011) (*ATA II*). At the same time, however, there is no doubt that the Port is a governmental entity. As noted above, the Port manages the tidelands as part of California's public trust for navigation and commerce. The Port is run by a Harbor Commission that is appointed by the Mayor of Los Angeles and confirmed by the Los Angeles City Council. The Port maintains its own police department and Port police officers are "peace officers" with the same powers and duties as any other law enforcement peace officer in the State of California. Cal. Penal Code §830.1. The Port issues bonds, the interest on which is exempt from state and federal income tax - the same as other public entities.

The regulations at issue in this case are targeted at the Licensed Motor Carriers providing drayage services to the shipping companies. The Port does not use the services of these companies and indeed concedes that it has "no direct hand in the daily movement of cargo." Financial Polices for the Harbor Department of the City of Los Angeles, April 2011, at 11.[3] None of the regulations at issue concern the procurement of goods or services for the Port. Indeed, the "'principal motivating factor'" for these regulations was to achieve specific environmental goals. *ATA I*, 559 F.3d at 1049.

The challenge in this case is to a regulatory program adopted by the Port of Los Angeles that regulates routes and services of motor carriers and admittedly will have a drastic affect on the prices those

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[3] The document is posted on the Port's web site at http://www.portoflosangeles.org/pdf/POLA_Financial_Policies.pdf

carriers charge. A significant purpose behind the regulatory program is to *decrease competition*, create barriers to entry in the drayage industry, and *increase costs*. Husing at 79. As this Ninth Circuit characterized it, the regulations "denigrate small businesses and insist that individuals should work for large employers or not at all." *ATA I*, 559 F.3d at 1056 .

The Husing report commissioned by the Ports of Los Angeles and Long Beach specifically identifies competition in the drayage industry as a problem. Husing at 22. That competition leads to lower drayage trucking fees—something the Port study identifies as a problem. Husing at 24. Indeed, this situation is, according the Husing Report, the result of deregulation. Husing at 24. The Port is concerned that Congress got it wrong. Through the regulations challenged in this case, the Port has set about to reverse the national policy set forth in the Federal Aviation Authorization Act and reinstate the patchwork of regulation that Congress sought to eliminate. These regulations seek to re-regulate the trucking industry—especially with regard to prices, services, and routes.

As noted in the Husing report, the licensed motor carriers are "highly entrepreneurial" companies. Husing at 77. Because of the efficiencies achieved by this model, there are few barriers to entry leading to intense price competition. Husing at 24. The elimination of such barriers to entry is another goal of deregulation. *See Tocher*, 219 F.3d at 1047. The realization of decreased cost through competition was also a goal of Congress in deregulating the industry.

Rowe, 552 U.S. at 371; *Californians*, 152 F.3d at 1187.

For all of the Husing Report's recognition of entrepreneurial competition present at the Port, this small business success is seen by the Port as a problem. Because of this competition and the low barriers to entry into this sector of the industry, large trucking firms are unlikely to attempt to compete for drayage contracts at the port. Husing at 80. Thus a feature of the regulations that Husing views as beneficial is the reduction in competition, putting many of the current licensed carriers and independent owner operators out of business, so that large trucking firms can come in and negotiate for increased drayage fees. *Id.*.

Husing sees the reduction in competition as an additional benefit that results from the increased costs for drayage that a smaller, less competitive drayage industry could command. Husing does not, however, compare these local purposes of regulation with the purpose of Congress in deregulating the trucking industry.

While the regulatory purpose of the challenged program is clear, there is no evidence of "proprietary" or "market participant" purpose. First, the Port does not enter into *any* business arrangements with the drayage trucking companies. As noted above, the drayage companies work directly with the shipping companies.

The closest connection between the drayage trucking companies and the Port is that the Port leases space to the shipping companies for docks. The Port's regulation of the drayage companies is analogous to an

effort by a commercial landlord to regulate the customers of the lessee – imposing restrictions on where they could park *after the leave the property*, etc. This is not a business transaction, but a pure regulation.

The Ninth Circuit's conclusion that the Port was a "market participant" was based on its finding that expansion of Port facilities was "stymied by legal opposition from community and environmental groups." *ATA II*, 660 F.3d at 390. The Port intended the Clean Truck Program to address some of these concerns and remove political and legal objections to port expansion. It was this connection between the regulation of Licensed Motor Carriers and the economic goals of the Port that the Ninth Circuit ruled rendered the challenged program "essentially proprietary." *Id.* at 399.

This is an argument that knows no limits. Such a rule would allow the port to prohibit importation of goods from foreign countries that were the subject of political objections. So long as the group voicing the objections seeks to block some action of the port, the lower court's rule allows the Port to avoid the rule of the Supremacy Clause. If the concept of "market participant" could be stretched that far, the Court's ruling in *Crosby* could easily be avoided.

The Port is not a market participant in the market for drayage trucking services, however. The Port has no business with the drayage companies. Instead it merely seeks to regulate the drayage trucks both on and off Port property. In any event, there is no market participant exception to the Supremacy Clause.

II. THERE IS NO MARKET PARTICIPANT EXCEPTION TO THE SUPREMACY CLAUSE

The "market participant doctrine" has no place in preemption law under the Supremacy Clause. That doctrine was created to deal with problems arising from the Court's "Dormant Commerce Clause" doctrine. The earliest mention of the Commerce Power in its "dormant" state is found in *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245, 251-52 (1829), where the Court simply upheld a state law allowing the construction of a dam. The Court there rejected the notion that the Commerce Clause withdrew from the state all power to regulate on subjects touching on interstate commerce. *Id.*; *New York v. Miln*, 36 U.S. 102, 132 (1837). Notwithstanding the lack of textual support in the Constitution, this Court has developed a Dormant Commerce Clause jurisprudence that intrudes on the "delicate balance" between state and federal power. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 610-12 (1997) (Thomas, J., *dissenting*).

The "developing Dormant Commerce Clause jurisprudence created the problem of federal courts being asked to forbid state programs that were not in conflict with any federal laws. That result created serious problems for the "delicate balance between state and federal governments. Thus, when the Court was presented challenges to state programs where the state was paying for items in commerce, rather than seeking to regulate broadly against commerce from competing states, this Court developed a "market participant" exception to its Dormant Commerce Clause jurisprudence. *Hughes v. Alexan-*

dria Scrap Corp., 426 U.S. 794, 810 (1976). As the Court noted in *Hughes*, "[n]othing in the purpose animating the Commerce Clause prohibits a State, *in the absence of congressional action*, from participating in the market and exercising the right to favor its own citizens over others." *Id.* (emphasis added).

The "market participant" doctrine, like the Dormant Commerce Clause, works when Congress has not spoken. That is not the case here.

Federal preemption of state law proceeds from the power granted in Article VI, Clause 2. Whatever compelling interest a state may have in a particular regulatory scheme, that scheme must give way in the face of a conflicting congressional enactment. *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 108 (1992); *Gibbons v. Ogden*, 22 U.S. 1, 210-11 (1824).

The question of preemption is one of congressional intent. *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 231 (1993); *Metropolitan Life, Ins. Co. v. Massachusetts*, 471 U.S. 724, 738 (1985). Thus, in the face of an express preemption provision, a state's economic interests are not the starting point for the analysis. This Court noted as much in its decision in *Wisconsin* Department *of Industry v. Gould, Inc.*, 475 U.S. 282, 290 (1986). Since *Gould*, however, the question of whether a state regulation escapes the preemptive force of the Supremacy Clause when the state argues that it was acting in a proprietary role or relying on its spending power has become confused. As the Port does in this case, state and local government now seek exception from the Supremacy

Clause when the state claims to be a "market participant."

The market participant doctrine in Dormant Commerce Clause jurisprudence does not exist as a free-standing, all purpose exception to preemption. "[T]he 'market participant' doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted. *Gould*, 472 U.S. at 289. What types of state regulation the Commerce Clause would permit is "an entirely different question" from what states may do in the face of Congress' decision to preempt state law. *Id.* at 290.

Since the decision in *Gould* this Court has continued to use the term "market participant," but has focused on whether state action "'was specifically tailored to one particular job'" rather than a more general regulation. *Chamber of Commerce v. Brown*, 554 U.S. 60, 70 (2008). More importantly, this Court has examined the state action to determine if it was the type of action Congress intended to preempt. *See Building & Construction Trades Council*, 507 U.S. at 231; *Golden State Transit*, 475 U.S. at 618. Thus, in *Golden State Transit*, this Court rejected the notion that a "traditional municipal function" was any more exempt from preemption than the state spending decision in *Gould*. It was not the nature of the municipal regulation, but rather whether it interfered with scheme set in place by Congress.

The state agency contract at issue in *Building & Construction Trades* was upheld – but on facts quite different from those presented in this case. First, Congress did not include an express preemption pro-

vision in the National Labor Relations Act. Thus, the question in *Building & Construction Trades* involved whether a state contract was the equivalent of a state law regulating labor contracts generally – or even regulating all construction contracts with the state. 507 U.S. at 232. Because the NLRA did not prohibit this type of project labor agreement, the state contract was no preempted. *Id.* at 231-32.

The federal law at issue in this action, the Federal Aviation Authorization Act, expressly preempts any "local law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. §14501(c)(1). No exception to this command appears in the law for regulations enacted to serve economic or environmental goals of the local entity.

This Court has described the "overarching goal" of these provisions as assuring that "transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces.'" *Rowe*, 552 U.S. at 371 (quoting *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992)). The regulations of the Port of Los Angeles have a different goal. Competition is seen as the problem rather than the goal. Husing at 22. The Port regulations seek to increase costs for Licensed Motor Carriers and independent owner-operator truckers in the hopes of driving these small businesses out of the market. *Id.* at 24. The Port believes that once this occurs, shippers will be forced to pay higher rates for drayage trucking and this will in turn attract national trucking firms with the economic resources necessary to satisfy other goals of the Port. *Id.*

CONCLUSION

The Port of Los Angeles is not a market participant by any definition of that doctrine. More importantly, however, market participation does not give license to state and local governments to issue general regulations that are expressly preempted by federal law. The Supremacy Clause takes no notice of the financial impact of its command that valid federal laws are the "supreme law of the land." The regulations at issue conflict with the express preemptive command of valid federal law. Article VI of the Constitution commands that those regulations must fall.

DATED: February, 2013.

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AMICUS CURIAE BRIEF

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AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[*]

Amicus the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business. More specifically, the Chamber has filed briefs in several of this Court's key market participant doctrine cases, including *Chamber of Commerce* v. *Brown*, 554 U.S. 60 (2008); *Building & Constr. Trades Council* v. *Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993) ("*Boston Harbor*"); and *Wisconsin Dep't of Indus., Labor & Human Relations* v. *Gould, Inc.*, 475 U.S. 282 (1986).

The Chamber files this brief to address a mistaken trend in Ninth Circuit case law. Contrary to this Court's precedent and the opinions of sister circuits, the Ninth Circuit engrafted into the express-preemption provisions of the Federal Aviation Administration Authorization Act ("FAAAA") a broad "market participant" doctrine exception that Congress did not see fit to create. In this case, by decree-

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[*] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

ing the terms for contracts between private shippers and truck operators and ostracizing dissenting truckers from the Port, the Port of Los Angeles has engaged in regulation of significant concern to *amicus* and the members it represents — regulation that the FAAAA preempts for the reasons explained below.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves "Concession Plans" that the Port of Los Angeles has adopted to limit the ability of shippers to contract with truckers transporting ("draying") shipping containers to or from the Port. The Port insists that the Plans establish voluntary contracts despite the fact that the Plans (1) are incorporated into a municipal ordinance backed by criminal sanction; (2) form part of a published tariff enforceable under the federal Shipping Act of 1984; and (3) have the primary purpose of "ameliorat[ing] adverse environmental effects" by "creating incentives for concessionaires to use clean and efficient trucks." Pet. App. 226a.

Federal law preempts these Plans. It is well-settled that, when a federal law contains an express preemption clause, this Court "focus[es] on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993); see also *Chamber of Commerce* v. *Whiting*, 131 S. Ct. 1968, 1977 (2011). The plain text of the Federal Aviation Administration Authorization Act ("FAAAA") preempts contrary state provisions that have the "force and effect of law." 49 U.S.C. § 14501(c)(1), § 14506(a). This Court has established

that "the phrase 'having the force and effect of law' is most naturally read to refer to binding standards of conduct that operate irrespective of any private agreement." *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 229 n.5 (1995) (some quotation marks and modifications omitted). There is no dispute that the relevant aspects of the Plans come within the scope of the FAAAA's preemption provisions if they have the requisite "force and effect of law."

The panel below disregarded these bedrock propositions and plain text to hold that the Port's adoption of the Concession Plans was not subject to preemption under the FAAAA because the Plans were supposedly implemented in the Port's proprietary capacity. Drawing on cases from the dormant Commerce Clause context, the panel held in relevant respect that (i) the Port could mandate that trucks have a plan for using off-street parking facilities *outside of the Port*, see Pet. App. 38a, and (ii) mandate the use of placards on trucks, see *id.* at 44a, because the Port was acting in a proprietary, not regulatory capacity. Specifically, the panel determined that, "[p]rior to the enactment of concession agreements, community members complained that drayage trucks regularly parked in surrounding neighborhoods, posing safety and health risks. The Port believed that off-street parking would mitigate drayage trucks' negative impacts and increase the community good-will necessary to facilitate Port expansion." *Id.* at 40a. And the panel further reasoned that the "placard provision is proprietary in nature" and therefore not preempted, because it was adopted "in response to community concerns" and "invites community participation and increases goodwill." *Id.* at 46a. In the panel's words, "[e]nhancing good-will in the commu-

nity surrounding the Port is an important and, indeed, objectively reasonable business interest." *Id.* at 40a.

Amicus respectfully submits that this brand of analysis cannot be the touchstone of FAAAA preemption. To the contrary, it is often the case that disregarding a federal statute's preemptive scope will promote local goodwill. Yet the whole point of preemption doctrine is to ensure that the Nation's public policy goals prevail over local concerns when Congress has explicitly spoken on a subject within its authority.

Indeed, the FAAAA's preemption provisions were enacted to deregulate an encrusted federal regulatory regime as well as to eliminate the patchwork of burdensome state trucking regulations that had grown up alongside that now-defunct body of federal regulation. Congress's purpose was to ensure that state governments would not undo federal deregulation with re-regulation of their own. See *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008). Thus, the FAAAA expressly provides that the critical inquiry is whether the state rules have the "force and effect of law." The Concession Plans at stake here undoubtedly do. The Plans are an out-and-out sovereign licensing scheme for regulating trucking markets weakly masquerading as mutual contracts. Such a licensing scheme with the "force and effect of law" does not comport with the text of the FAAAA. The Port's incorporation of the Plans in its Tariff 4 dispels any doubt about the Plans' regulatory nature. See 46 U.S.C. § 40501(f).

The implications of this case are deep and have the potential to cut across the entire field of federal

regulation. Even if this case did not involve specific facts that are themselves remarkable — the imposition of a licensing regime by the municipal government that hosts the largest port in the Nation denying access to truck operators unless they submit to regulations establishing how drayage trucks can operate — this case would still be of immense significance. The off-street parking and placard requirements, seen in the narrowest light, "may be * * * the obnoxious thing in its mildest and least repulsive form," but as this Court has elsewhere remarked, such "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Stern* v. *Marshall*, 131 S. Ct. 2594, 2620 (2011) (quoting *Boyd* v. *United States*, 116 U.S. 616, 635 (1886)).

In short, these regulations are the camel's nose under the FAAAA's express preemption tent. If the court below is allowed to declare as market participation entire swaths of regulation in the environmental and safety areas, and municipalities are emboldened to issue edicts vaguely designed to ensure nothing more than good relations with private neighbors, then the express-preemption provisions in federal statutes will fall prey to ready circumvention.

ARGUMENT

I. The Ninth Circuit erroneously held that the FAAAA does not preempt the Concession Plans.

When a federal law contains an express preemption clause, this Court "focus[es] on the plain wording of the clause, which necessarily contains the best evi-

dence of Congress' preemptive intent." *Easterwood*, 507 U.S. at 664. The panel departed from that teaching and bolted onto the FAAAA a market-participant exception wholly absent from the plain language of the statute.

A. The FAAAA expressly preempts state provisions that have the "force and effect of law."

Both of the provisions of the FAAAA that are relevant here expressly preempt contrary provisions that have the "force and effect of law." The FAAAA unambiguously provides that "a State [or] political subdivision of a State * * * may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier * * * with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The FAAAA also prevents States and their political subdivisions from enacting or enforcing any "provision having the force and effect of law that requires a motor carrier * * * to display any form of identification on or in a commercial motor vehicle * * * other than forms of identification required by the Secretary of Transportation." § 14506(a).

In *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995), this Court interpreted the meaning of the phrase "force and effect of law" in the context of a similar preemption provision contained in the Airline Deregulation Act of 1978 (ADA). *Wolens* explained that "the phrase 'having the force and effect of law' is most naturally read to refer to binding standards of conduct that operate irrespective of any private agreement." *Id.* at 229 n.5 (some quotation marks and modifications omitted); see also *id.* at 240

(O'Connor, J., dissenting in part) ("action to invoke the State's coercive power * * * by means of a generally applicable law" is action "having the force and effect of law"); U.S. Br. 9 ("Any common-sense understanding of the term 'force and effect of law' is satisfied by a provision backed by criminal penalties which only a state and not a mere proprietor can enforce.") (some quotation marks omitted).

As a result, under *Wolens*, "privately ordered obligations * * * do not amount to a State's 'enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law'" within the meaning of the ADA. *Id.* at 228-229. By contrast, where a state enacts "binding standards of conduct that operate irrespective of any private agreement," such provisions clearly have the "force and effect of law" and are accordingly preempted. See also *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 329 (2008) (addressing regulation under the Medical Device Amendments of 1976 that sets forth a "'general rule' pre-empting state duties 'having the force and effect of law (whether established by statute, ordinance regulation, or court decision)").

The congressional instruction to preempt any "other *provision* having the force and effect of law," 49 U.S.C. § 14501(c)(1) (emphasis added), expresses an intent to preempt not just laws that are labeled as statutes or regulations, but also forms of state and local action that effectively operate as laws, regardless of their label. It therefore requires a broader construction than the many preemption provisions that do not come equipped with such anti-circumvention language. See, *e.g.*, 2 U.S.C. § 453(a) ("preempt any provision of *State law* with respect to

election to Federal office") (emphasis added); 6 U.S.C. § 488g(b) ("preempts *the laws of any State* to the extent that such laws are inconsistent with this part * * * .") (emphasis added); 15 U.S.C. § 5903 ("This chapter shall supersede any provision of *State law* (*or the law of any political subdivision of a State*) * * * .") (emphasis added).

B. The Port's Concession Plans have the "force and effect of law."

There can be little dispute that the Concession Plans have the "force and effect of law." While nominally described as calling for "contracts" or "agreements," the Concession Plans are essentially a state licensing scheme restricting access to the Port in furtherance of regulatory-style goals.

First, as part of its approval of the Concession Plans, the Port issued a broad prohibition providing that, effective October 1, 2008, "no Terminal Operator shall permit access into Terminal in the Port of Los Angeles to any Drayage Truck unless such Drayage Truck is registered under a Concession or a Day pass from the Port of Los Angeles." Pet. App. 12a. The Port thus set as a background rule a prohibition on access to the Port, with a requirement that drayers receive permits to obtain such access.

Second, it is undisputed that the Port does not, pre- or post-Concession Plan, participate in transactions between shippers and drayers carrying container traffic into and out of the Port. See, *e.g.*, Pet. App. 6a, 43a (Ninth Circuit decision after trial), 221a-222a (initial Ninth Circuit interlocutory appeal) 255a, 257a, 259a (initial District Court preliminary injunction decision).

This is not a case, in other words, of the Port establishing the contract terms for an agreement between itself and the providers of drayage services. Nor does this case involve state enforcement of privately ordered obligations between motor carriers and terminal operators. Instead, the Port here requires that drayers accept certain provisions in order to obtain and to retain the right to do business with shippers that use the Port to import and export cargo.

Third, reinforcing that they have the "force and effect of law" under the FAAAA, the Concession Plans are expressly incorporated into statutory law in two significant ways. As an initial matter, they are embodied in a local municipal ordinance backed by the threat of criminal prosecution. See Pet. 31; see also Pet. App. 83a n.5.

In addition, the Concession Plans are part of the Port's "Tariff No. 4." Pet. App. 83a (trial findings); see *id.* at 183a, 203a, 212a, 241a. Tariff No. 4 plainly provides that "no Terminal Operator shall permit access into any Terminal in the Port of Los Angeles to any Drayage Truck unless such Drayage Truck is registered under a Concession or a Temporary Access Permit" and that the "terms and conditions for the Concession are set forth in the Port of Los Angeles Concession Agreement between the Port of Los Angeles and the Licensed Motor Carrier." Port of Los Angeles, Tariff 4, Section 20, Clean Air Action Plan — General Rules and Regulations, Item No. 2040, *available at* http://www.portoflosangeles.org/Tariff/SEC20.pdf (last visited Feb. 20, 2013). Tariff 4 was made publicly available via posting on the Internet. *Ibid.* Any failure to comply with the tariff (and thus the Concession Plans) can give rise to criminal penal-

ties, including a misdemeanor conviction, fines, and imprisonment. JA85.

Moreover, as part of the Port's tariff, the Concession Plans are subject to review by the Federal Maritime Commission (FMC). See, *e.g.*, *New York Shipping Ass'n* v. *FMC*, 854 F.2d 1338 (D.C. Cir. 1988) (affirming Federal Maritime Commission assertion of jurisdiction over tariffs); *Plaquemines Port, Harbor and Terminal Dist.* v. *FMC*, 838 F.2d 536 (D.C. Cir. 1988) (holding the FMC had jurisdiction over port offering essential services and controlling access to private facilities). Indeed, the Port submitted the Plan to the FMC for review. See Agreement 201196 (submitted Sept. 30, 2008), *available at* www2.fmc.gov/agreement_lib/201196-000.pdf (last visited Feb. 20, 2013).

Hence, pursuant to the Shipping Act of 1984, marine terminal operator agreements like the Concession Plans unavoidably carry the force of law, because they are "enforceable by an appropriate court as an implied contract *without proof of actual knowledge of its provisions*." 46 U.S.C. § 40501(f) (emphasis added). Such provisions are deemed "contracts" only by operation of a legal fiction, since in actuality they are fully enforceable under federal law once adopted by a port and made publicly available. The Port's submission of the Concession Plans (and consequent triggering of Section 40501(f)) is inconsistent with its litigating position that it is acting as a market participant.

Fourth, it is undisputed that: (i) the Port earns all or much of its revenue based on the amount of container traffic transiting the Port; (ii) the Concession Plans will drive up drayage contract pricing, increasing shipping costs; and (iii) the Concession plans will

thereby cause at least a three percent diversion of container traffic to other ports. See Pet. App. 29a (Ninth Circuit appeal after trial); 89a (Finding of Fact ¶ 80); 216a ("'additional components of the Concession agreements,' [include] 'creating a 'market characterized by the presence of fewer, generally larger and more stable' licensed motor carriers. Los Angeles Board Resolution 6522."); see also *id.* at 89a (Finding of Fact ¶ 79). The whole point of the Concession Plans was to drive up the costs for drayage services, thereby reducing demand and/or incentivizing a shift to newer-generation heavy-duty diesel trucks. It is axiomatic that reducing supply leads to higher prices. See, *e.g.*, *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 777 (1999) ("price will * * * rise in order to limit demand to the reduced supply"). It follows that the Port's purpose was not to promote business development at the Port, but rather to further the City's environmental policies.

Just as this Court explained in *Chamber of Commerce* v. *Brown*, 554 U.S. 60 (2008), so too here:

> It is beyond dispute that California enacted AB 1889 in its capacity as a regulator rather than a market participant. AB 1889 is neither "*specifically tailored* to one particular job" nor a "legitimate response to state procurement constraints or to local economic needs." *Gould*, 475 U.S., at 291. As the statute's preamble candidly acknowledges, the legislative purpose is not the efficient procurement of goods and services, but the furtherance of a labor policy. See 2000 Cal. Stats. ch. 872, § 1.

Id. at 70 (emphasis added). If the Port could simply recharacterize its regulatory environmental interests as proprietary business interests (as it sought to do in opposition to certiorari, see Opp. 17 n.8), that would create an exception to the express preemption directive through which a (drayage) truck could be driven.

Taken together, these legal sanctions and requirements demonstrate that the Concession Plans have the "force and effect of law." Indeed, the Ninth Circuit did not seriously suggest to the contrary. And the Port itself has effectively conceded that the Concession Plans have the "force and effect of law" within the meaning of the statute:

> Even if a measure enacted by a state entity has such force and effect, that does not mean that the measure is regulatory or that the market participant doctrine otherwise does not apply. *It means merely that the measure falls within the language of section 14501(c).* Whether the market participant doctrine is applicable is a separate question.

Opp. 13 (emphasis added). That a "measure falls within the language of" an express preemption provision is not a "mere[]" curiosity to be so easily dismissed; it should terminate the judicial inquiry. The Port's circular argument, assuming the very point at issue (whether judicial exceptions to FAAAA preemption can properly be created), see *King* v. *Vincent's Hosp.*, 502 U.S. 215, 222 (1991), should be rejected. The "scheme is tantamount to regulation," *Gould*, 475 U.S. at 287 (emphasis added), and thus preempted.

C. There is no reason to engraft a judicially created market participant exception into the FAAAA.

Rather than relying on the FAAAA's plain text and this Court's precedents construing comparable language, the Ninth Circuit read into the FAAAA a "market participant" doctrine based on jurisprudence under the dormant Commerce Clause. The Port similarly contends that courts must always undertake an additional non-textual "market participant" analysis engrafted onto express preemption provisions written by Congress. That conclusion is incorrect for several reasons.

First, and as explained above, any importation of market participant doctrine into the FAAAA cannot be reconciled with the statute's text. Under the relevant FAAAA provisions, *all* provisions that have the "force and effect of law" are preempted regardless of whether the State purports to act in its regulatory or proprietary capacity. There is no warrant in the statute for drawing a distinction based on the intentions behind the enactment of a particular law.

The pivot point for determining the extent of preemption in a statute with an express-preemption provision is the intent of Congress, not the constitutional objectives of dormant Commerce Clause doctrine. The dormant Commerce Clause establishes background rules of constitutional protection for our "national 'common market.'" *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977). Once Congress acts, however, the default rules of the dormant Commerce Clause, which includes a narrowly tailored market participant doctrine, are subject to change. "[T]he 'market partici-

pant' doctrine reflects the particular concerns underlying the Commerce Clause, *not any general notion regarding the necessary extent of state power in areas where Congress has acted.*" *Gould*, 475 U.S. at 289 (emphasis added).

That distinction is particularly important here because the objective of the FAAAA is not simply to prevent States and localities from fracturing the national common market in the transportation of goods — a concern that overlaps with the dormant Commerce Clause — but *to deregulate* that market. See *Rowe*, 552 U.S. at 368 (describing deregulatory and preemptive purposes of the Motor Carrier Act of 1980 and the FAAAA); see also *id.* at 370-371 (observing that the Court determined in *Morales* v. *TWA, Inc.*, 504 U.S. 374, 390 (1992), that "pre-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives"). The scope of preemption under the FAAAA, in other words, is not the same as the scope of unconstitutional state/local government conduct under the dormant Commerce Clause.

In this regard, this case differs from this Court's holding in *Boston Harbor*. That case involved the judicial doctrine of implied preemption created to protect the policies of the National Labor Relations Act ("NLRA") in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1956). In *Boston Harbor*, this Court recognized a market-participant exception to *Garmon* preemption. See 507 U.S. at 231 (a State can manage its "own property [by] pursu[ing] its purely proprietary interest * * * where analogous private conduct would be permitted."). The Court upheld the City of Boston's contractual requirements

from challenge because they were designed "to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost," and for that reason, the City was "acting as [a] proprietor rather than regulator." *Id.* at 228. Critically, the NLRA contains no express preemption provision like that in FAAAA Section 14501(c)(1). Where an act contains an express preemption provision, as here, the scope of preemption must mirror the scope of the provision. See *Easterwood*, 507 U.S. at 664.

Second, the structure of the FAAAA supports this interpretation. The FAAAA's preemption provisions contain a series of exceptions limiting their scope. For example, section 14501(c)(2) lists a series of "matters not covered" by the preemptive scope of section 14501(c)(1), including "the safety regulatory authority of a State with respect to motor vehicles [etc.]" 49 U.S.C. § 14501(c)(2). The same is true of section 14506. Under that provision, several express "[e]xception[s]" to the prohibition against requiring display of identification are listed, including exceptions permitting a State to continue to require a display of credentials under the International Registration Plan, the International Fuel Tax Agreement, or a "State law regarding motor vehicle license plates or other displays that the Secretary determines are appropriate." *Id.* §§ 14506(b)(1)-(3).

Where such exceptions are expressly provided, it is inappropriate to imply others. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. 71, 87-88 (2006) ("The existence of these carve-outs both evinces congressional sensitivity to state prerogatives in this field and makes it inappropriate for courts to create additional, implied exceptions."); *Rowe*, 552

U.S. at 374 (observing that the FAAAA "explicitly lists a set of exceptions (governing motor vehicle safety, certain local route controls, and the like), but the list says nothing about public health"); see also *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Third, the straightforward reading of the FAAAA's express-preemption provision is bolstered by the fact that other statutes contain explicit "market participant"-style language. See *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, 375-376 (1958) ("In light of the much other so-called antitrust legislation enacted prior and subsequent to the Clayton Act, it seems plain that the rule expressio unius exclusio alterius is applicable, and that the definition contained in § 1 of the Clayton Act is exclusive.") (footnote omitted).

For example, in enacting the materially identical preemption provision in the ADA, Congress provided expressly for a proprietary exception for municipally owned airports. See 49 U.S.C. § 41713(b)(3). See also 15 U.S.C. § 2075(b) (allowing a federal, state, or local government to "establish[] or continu[e] in effect a safety requirement applicable to a consumer product for its own use" under certain circumstances); cf. 49 U.S.C. § 30103(b)(1) (allowing federal, state, or local governments to "prescribe a standard for a motor vehicle or motor equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard"). The existence of these provisions amply demonstrates that, where Congress wants to include a market participant exception in a statute, it knows how to do it. It did not do so here.

Fourth, the market participant doctrine — as conceived by the panel — is extraordinarily malleable. The very facts of this case demonstrate how a State could mask its public-policy-driven actions as actions taken in its "proprietary capacity."

As the first Ninth Circuit panel explained, the Concession Plans were trying to solve a perceived market failure — classic regulatory action. The record in the case readily demonstrates that a "significant purpose behind the Concession agreements was purely environmental." Pet. App. 226a. The Plans "sought to ameliorate [] adverse environmental effects by forcing a direct contractual relationship upon the motor carriers, by mandating vehicle maintenance requirements, and by enhancing motor carrier efficiency while creating incentives for concessionaires to use clean and efficient trucks." *Id.* And "[a] mere reading of some of the stated purposes of the Los Angeles Board, for example, underscores an extensive attempt to reshape and control the economics of the drayage industry in one of the largest ports in the nation." Pet. App. at 225a-226a; see also *id.* at 153a n.2 (district court opinion agreeing that "enjoining the implementation of the Concession agreements will stop cold the clean up of port trucks") (quotation marks omitted).

The Port's principal defense at the outset of these proceedings was that it had "plenary" sovereign power over tidelands and hence its actions were immune from preemption. See Pet. App. 250a. The district court repeatedly rejected this argument, including after a full trial. See *id.* at 105a, 112a-113a. But the key point is that the Port's theory that it could exercise exclusive sovereignty over port lands is quite dif-

ferent from the Ninth Circuit's theory that the Port was simply wielding power over property in the same way an ordinary private citizen or corporation would attempt to do via voluntary contract.

Indeed, the Port's intent was clearly to tame the market. The Port commissioned "expert testimony" that "the economics of an independent owner-operator based drayage system creates perverse incentives for independent owner-operators to skimp on maintenance." *Id.* at 126a. That expert conclusion, however, is directly contrary to the conclusion that Congress reached in enacting the FAAAA as a deregulatory statute designed to preserve the ordinary functioning of the private market. See *Rowe*, 552 U.S. at 368.

Interference with private transactions in this fashion is a kind of genetic marker for sovereign conduct and not mere market participation. Here, "the State interfered with the *natural functioning* of the interstate market either through prohibition or through burdensome regulation." *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976) (emphasis added). Simply put, there is no reason to graft into the FAAAA an atextual market participant exception that permits a State to regulate transportation in the guise of acting in its proprietary capacity.

Fifth and finally, in incorporating the market participant doctrine into the FAAAA, the panel opinion broadened the scope of the limited market participant exception recognized in dormant Commerce Clause jurisprudence. "The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State

may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market." *South-Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 97 (1984) (plurality). This Court has repeatedly held that to claim the protections of the doctrine, the governmental unit in question must not be pursuing policy aims but instead must be engaging in unalloyed proprietary activity. Under the doctrine, a government is "managing its own property [by] pursu[ing] its *purely* proprietary interest * * * where analogous private conduct would be permitted." *Boston Harbor*, 507 U.S. at 231 (emphasis added). The analysis reduces to "a single inquiry: whether the challenged program constitute[s] *direct* [S]tate participation in the market." *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 435 n.7 (1980) (quotation marks omitted). See also generally *Boston Harbor*, 507 at 227-232.

Applying these principles, the Fifth Circuit has held that mere ownership of a facility does not make a government entity a participant in a market operating on that facility's premises. See *Smith* v. *Dep't of Agric.*, 630 F.2d 1081 (5th Cir. 1980). In *Smith*, the Fifth Circuit invalidated rules adopted by Georgia's Department of Agriculture that gave non-residents inferior sales locations in a farmers' market owned and operated by the State. *Id.* at 1082. The Fifth Circuit rejected the State's argument that it was acting as a market participant. The court noted that no arm of the State "produce[d] the goods to be sold at the market" or "engage[d] in the actual buying or selling of those goods." *Id.* at 1083. Instead, the State had "simply provided a suitable marketplace for the buying and selling of privately owned goods." *Ibid.*; see also *Florida Transp. Servs., Inc.* v. *Miami-Dade*

Co., 703 F.3d 1230 (11th Cir. 2012). Here, the Port's regulations have the same effect as the invalidated regulation in *Smith*, and in fact go further by interposing a state-established and state-run licensing regime on the private agreements of shippers and drayers at the largest Port in the Nation.

The panel sought to get around these limitations on the market participant doctrine by relying on this Court's decision in *Alexandria Scrap*. See Pet. App. 24a ("The Supreme Court has applied the market participant doctrine to a case *not* involving 'procurement' of goods * * * [i]n *Hughes* v. *Alexandria Scrap Corp.*") (emphasis added). The panel appeared to suggest that the State of Maryland was not purchasing anything in *Alexandria Scrap*. But this is directly contrary to how the Court described Maryland's program, which resulted in the purchase of wrecked hulks, albeit for the purpose of ridding the State of such inoperable vehicles. "[U]ntil today the Court has not been asked to hold that the *entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce* creates a burden upon that commerce if the State restricts *its trade* to its own citizens or businesses within the State." *Alexandria Scrap*, 426 U.S. at 808 (emphasis added). It was the dissent in *Alexandria Scrap* that argued that it could not "agree with the Court that this case is solely to be analyzed in terms of Maryland's 'purchase' of items of interstate commerce * * * ." *Id.* at 819 (Brennan, J., dissenting). *Alexandria Scrap* cannot support the panel's expansion of the market participant doctrine.

Accordingly, the panel erred in two significant respects: by importing the dormant Commerce Clause's

market participant doctrine into the FAAA in the first place, and then by giving that doctrine a broader reading than this Court has given it in the dormant Commerce Clause context.

CONCLUSION

For these reasons and those stated in petitioner's brief, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-798

In The
Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, CALIFORNIA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE LOS ANGELES AREA CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Los Angeles Area Chamber of Commerce ("LA Chamber") is Southern California's largest not-for-profit business federation, representing more than 1,600 member businesses from Los Angeles, Orange, Riverside, San Bernardino and Ventura Counties. The LA Chamber's membership includes individual entrepreneurs, small- and medium-size businesses and multinational conglomerates from all sectors of the business community, from aerospace to shipping to manufacturing to entertainment. The LA Chamber actively promotes a strong economy and an attractive business environment throughout the greater Los Angeles area through legislative advocacy, community support and information outreach programs.

The LA Chamber submits this brief based on the considerable impact that the Port of Los Angeles ("Port") has on the business environment in Southern California. The LA Chamber's recognition of this impact predates the Port's very existence, which came

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[1] Pursuant to Supreme Court Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

about, in part, due to the early and extensive efforts of the LA Chamber in lobbying Congress to place a deepwater port in Los Angeles. As a result of efforts by the LA Chamber and others, work on the San Pedro breakwater began in April 1899. Since that time, the Port has grown to become the leading container port in the United States in terms of cargo volume. As stated in the district court's findings of fact below, the Port is connected, directly and indirectly, with over 900,000 jobs and more than $39 billion in annual wages and tax revenues. Petitioner's Appendix ("Pet. App.") 70a.

While other parties will address the legal question of whether the Ninth Circuit was correct in holding that the off-street parking and placard provisions in the concession agreement adopted as part of the Port's Clean Truck Program ("CTP") are not preempted by the Federal Aviation Administration Authorization Act ("FAAA Act"), the LA Chamber submits this short brief on behalf of its member businesses to emphasize the importance of the CTP and the Port's Clean Air Action Plan ("CAAP") to the future growth of the Port, the surrounding communities and the regional economy. Following a fifteen-month long process and considerable stakeholder input, the Port developed the CTP and the concession agreement to address community concerns about safety, emissions and congestion related to the Port. It did this with the intention, *inter alia*, of breaking a stalemate in which the Port, community organizations and the courts had found themselves, and which

had stymied the Port's expansion projects and prevented the adoption of technical improvements to mitigate impacts on the community.

Had the Port not taken these steps, the status quo that had existed for many years might have persisted, the Port's projects would have been further delayed, and the air quality and other impacts that nearby residents faced would be unchanged. As a result of the CTP and the concession agreement, however, these impacts have decreased dramatically and the Port has been able to take actions that are both pro-growth and responsive to the health and safety of the nearby communities. For this reason, the LA Chamber urges the Supreme Court to affirm the Ninth Circuit's opinion.

SUMMARY OF ARGUMENT

The Port of Los Angeles is one of the busiest container ports in the world and handles more cargo volume than any other port in the country. It is a critical regional asset, which converts the container traffic that passes through it into jobs, wages, tax revenue and a broader revenue base for the surrounding community and the greater Los Angeles region. Integral to the Port's operation are the drayage trucks that move containers to and from the Port; however, the impact of drayage traffic has led to community concerns about air quality, congestion and safety, and resulted in opposition to the Port's plans

to improve and expand its facility. After years of litigation and stalled projects, the Boards of Harbor Commissioners for Los Angeles and Long Beach (the location of an adjacent port facility) produced a Clean Air Action Plan in 2006 to address the concerns of the community. In order to effectuate the goals in the CAAP, the Port, working with various stakeholders, developed the Clean Truck Program and adopted a concession agreement for motor carriers providing drayage services.

The Port is a vital economic engine for Southern California, and, in the LA Chamber's view, the CAAP, the CTP and the concession agreement, as modified by the Ninth Circuit's opinion, represent pro-development and pro-growth initiatives, which are vital both to maintain and expand the Port's business and economic impact while reducing adverse impacts to the surrounding communities related to congestion, safety and air quality. Based on the LA Chamber's unique understanding of the local economy and the Port's critical place in it, the LA Chamber supports affirmance of the Ninth Circuit's opinion in its entirety.

Specifically, the LA Chamber supports the off-street parking and placard provisions in the concession agreement (as well as the financial capability and maintenance provisions, which are not at issue here) as reasonable and meaningful steps to mitigate impacts to the communities near the Port. If the Port is prohibited from taking such modest steps, the joint efforts of the Port and the nearby communities to

expand and modernize the Port in a way that addresses the concerns of the nearby communities might stall, and the Port and its neighbors face the possibility of returning to the stalemate that persisted for years during which time the Port was unable to complete expansion projects *and* unable to make improvements to reduce impacts caused by drayage traffic.

For this reason, the LA Chamber respectfully urges the Supreme Court to affirm the Ninth Circuit's decision that the off-street parking and placard provisions are not preempted by the FAAA Act. While not at issue, the LA Chamber notes that it also agrees with the Ninth Circuit's decision that the employee-owner provision would interfere with the ability of concessionaires at the Port to contract with independent operators, without playing any role in mitigating the adverse impact from drayage traffic on the surrounding communities.

ARGUMENT

THE LA CHAMBER SUPPORTS AFFIRMANCE OF THE NINTH CIRCUIT'S OPINION

A. The Ninth Circuit's Opinion

As the Ninth Circuit explained in its opinion, for ten years beginning in 1997, the efforts by the Port of Los Angeles to expand its cargo terminal facilities to accommodate an increased demand in shipping and larger ships faced substantial opposition and litigation

from community and environmental groups. *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384, 391 (9th Cir. 2011). Beginning in 2008, as part of an effort to respond to community concerns relating to the expansion, the Port adopted a concession agreement directed toward motor carriers operating drayage trucks on Port property as part of the Port's Clean Truck Program. *Id.* at 390. Petitioner American Trucking Associations, Inc. challenged the concession agreement in district court. Out of the fourteen separate requirements in the agreement, Petitioner challenged five specific provisions at trial arguing that they were preempted by the FAAA Act, which generally forbids states and local municipalities from enacting or enforcing a law, regulation or other provision "having the force and effect of law" related to "a price, route, or service of any motor carrier . . . with respect to the transportation of property." *Id.*; 49 U.S.C. § 14501(c)(1). Following trial, the district court ruled that none of the challenged provisions were preempted by the FAAA Act because they did not relate to the motor carriers' rates, routes and services, and because the State acted as a market participant when it adopted the concession agreement. *American Trucking*, 660 F.3d at 395.

On appeal, the Ninth Circuit held that the concession agreement, as a whole, did not affect rates, routes or services, and thus was not preempted *per se*. *Id.* at 398. Instead, the panel held that each of the five provisions must be analyzed under the FAAA Act. *Id.* The Ninth Circuit affirmed the district court's

holding as to four of the challenged provisions, holding that (1) the financial capability provision was not sufficiently related to rates, routes or services to trigger preemption under the FAAA Act, *id.* at 404; (2) the maintenance provision was saved by the FAAA Act's safety exception, *id.*; and (3) the off-street parking and placard provisions came within the market participation exception, *id.* at 407, 409.

The Ninth Circuit reversed the district court's holding only as to the employee-driver provision, which requires concessionaires to phase out the use of independent owner-operators for drayage services and replace them with employees of licensed motor carriers. *Id.* at 407-08 (holding, contrary to the district court, that the employee-driver provision did not fall within the market participant doctrine). The panel concluded that this provision was designed to impact third party behavior by imposing conditions on the contractual relationships between motor carriers and drivers and thus was "tantamount to regulation," *id.* at 408 (*quoting Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 289 (1986)), and preempted by the FAAA Act.

The LA Chamber agrees with the Ninth Circuit's opinion in all respects. The four surviving provisions are all aimed at addressing community concerns regarding the impact of increased drayage traffic on the surrounding areas, particularly with regard to safety, congestion, and increased emissions. By contrast, the employee-driver provision would go beyond

such impacts and would interfere with economic opportunities that otherwise would exist between concessionaires and independent contractors, which include local small businesses. In analyzing the provisions under the FAAA Act, the LA Chamber believes the Ninth Circuit struck the appropriate balance with respect to the effects the provisions would have on the local and regional economy.

B. The Port's Role in the Regional Economy

The enormous scale of the Port's contribution to the regional economy was well-documented at trial. The Port is the leading container port in the United States in terms both of shipping container volume and cargo volume. Pet. App. 69a. In 2007, it was the thirteenth busiest port in the world, and the fifth busiest in the world when combined with the cargo volume at the adjacent Port of Long Beach. *Id.* In both 2007 and 2008, the Port handled more than $240 billion in cargo.[2] *Id.* The district court found that this activity is connected with over 900,000 jobs in the greater Los Angeles region and contributes more than

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[2] Although the global economic downturn that began in 2008 impacted the volume of cargo moving through the Port, this volume has rebounded in recent years. Shipping volume is often measured in twenty-foot equivalent units ("TEUs"). In 2011, the Port moved 7.9 million TEUs, which was up from 6.7 million TEUs in 2009, and close to the national container record of 8.5 million TEUs that the Port set in 2006. *See* http://www.portoflosangeles.org/maritime/growth.asp.

$39 billion in annual wages and tax revenues. Pet. App. 70a. When the Port's expansion projects are completed, the Port's economic impacts on the region will grow substantially: the Port projects that increasing global trade and larger ships will double the demand for its cargo handling capacity over the next decade. Pet. App. 72a-73a. The LA Chamber is committed to strong and sustainable growth of the local economy, and believes that the Ninth Circuit decision enables the Port to meet this demand and continue to serve as a key economic engine in the greater Los Angeles region.

C. Without the Ability to Address Community Concerns, the Port's Ability to Modernize and Expand Will Be Seriously Compromised

The economic activity generated by the Port depends on the operation of drayage trucks to move containers between the ships that arrive at the Port and points inland. These trucks have been at the center of community concerns about the effects of the Port's expansion efforts. As noted above, the Port's expansion projects were stalled for years by opposition from community groups, which claimed that the projects would create adverse impacts on the surrounding communities. *American Trucking*, 660 F.3d at 391. This stalemate also obstructed the Port's ability to make technical improvements to reduce such impacts. After multiple lawsuits challenging expansion projects, and in response to the general

concerns raised by the nearby communities, the Boards of Harbor Commissioners for Los Angeles and Long Beach developed the CAAP in November 2006 to address concerns regarding emissions impacts. *Id.* at 391-92. In response to the CAAP, the Port undertook a fifteen-month development period that included outreach to various stakeholders, which resulted in its adoption of the CTP and the concession agreement. *Id.* at 392-93.

The link between the concession agreement, the region's economy and the mitigation of impacts relating to the Port's activity should not be underestimated. The concession agreement is a key part of the Port's efforts to respond to local concerns related to the Port's development. If the Port is not permitted to take such modest and reasonable steps as those represented by the off-street and placard provisions, its ability to adopt limited measures tailored to specific, local issues arising from Port activity will be compromised, which may result in additional litigation and delays. This not only costs the additional jobs and economic activity that otherwise would be the result of a modernized and expanded Port, but also puts at risk the Port's existing business, some of which may shift to other facilities. In addition, the Port's efforts to make improvements to address air quality, safety and congestion impacts would be frustrated. Having championed the original development of the Port, the LA Chamber believes that the Port, the local communities and other stakeholders with knowledge of the specific economic and social

factors at play, are best suited to put in place a pro-development, green growth program that enables the Port and the region to take advantage of the growing demand for shipping while mitigating the impacts related to the Port's economic activity.

CONCLUSION

For the reasons stated above, the LA Chamber supports the Ninth Circuit's judgment and requests that it be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-798

In The Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

THE CITY OF LOS ANGELES, THE HARBOR DEPARTMENT OF THE CITY OF LOS ANGELES, THE BOARD OF HARBOR COMMISSIONERS OF THE CITY OF LOS ANGELES,

Respondents.

and

NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, COALITION FOR CLEAN AIR, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ORGANIZATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*[1]

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. NACo provides essential services to the Nation's 3,068 counties through advocacy, education, and research.

The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the *amici* made a monetary contribution to its preparation (Rule 37.6).

educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan professional organization consisting of more than 3,500 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

These organizations (collectively, "Local Government *amici*") have an interest in the Court's proper recognition of the market participant exception to express preemption provisions in federal legislation, including the Federal Aviation Administration Authorization Act. The approach to market participant exception analysis advanced by Petitioner threatens to intrude upon the rights and authority that, in our federal system, inure to state and local governments when acting in their proprietary capacity as purchasers, sellers, landlords, and business managers. The interpretation advanced by Petitioner also puts at

risk many programs that state and local governments have designed and implemented in their proprietary capacity and as participants in the free market, yet nonetheless promote important environmental policies and provide other community benefits.

SUMMARY OF ARGUMENT

It is well established that a State or local government acting as a market participant, rather than as a market regulator, is unencumbered by the prohibitions imposed by both the dormant Commerce Clause and implied federal preemption. *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 227 (1993) ("*Boston Harbor*"); *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984); *White v. Massachusetts Council of Construction Workers*, 460 U.S. 204, 206-08 (1982); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980); *Hughes v. Alexandria Scrap*, 426 U.S. 794, 810 (1976). This case, however, presents an issue the Court has not previously addressed at length: how the market participant exception applies where Congress has expressly preempted state and local regulation in a given area of economic activity. All of the Circuit Courts of Appeals that have addressed the issue have found that the market participant exception applies to express preemption, though they have at times emphasized different facets of the doctrine.

Local Government *amici* fully endorse the detailed and persuasive arguments set forth by Respondents City of Los Angeles, et al., and Natural Resources Defense Council, et al. The off-street parking and placard provisions of the concession contract entered into by the Port of Los Angeles (the "Port") and licensed motor carriers (LMCs) providing drayage services at the Port are not preempted by Section 14501(c) or Section 14506(a) of the Federal Aviation Administration Authorization Act (FAAAA). This is so for either one of the following reasons: As contractual terms between a municipal entity acting as a proprietary landlord and service providers seeking access to municipal property the provisions do not have "the force and effect of law" and are therefore outside the scope of the preemption provisions. Alternatively, even if the two provisions of the concession contract do, in some respect, have "the force and effect of law" the market participant exception nonetheless exempts them from preemption under the FAAAA.

Local Government *amici* submit this brief for several reasons: to underscore the market participant exception's core federalism values; to advance a principled analytic approach to applying the exception in the context of express preemption; to synthesize courts' various approaches to determining when state and local government action constitutes market participation so as to respect the diversity of interests involved; and to argue that state and local governments acting in their proprietary capacity as landlords and

property managers – as the Port of Los Angeles did here – may properly be considered market participants when dealing with those that use their property for business purposes.

ARGUMENT

I. THE PRINCIPLES OF FEDERALISM AND EVENHANDEDNESS SUPPORT THE PRESUMPTION AGAINST STATUTORY PREEMPTION OF MARKET PARTICIPANT BEHAVIOR IN THE FAAAA

The market participant exception has its origins in an old common law distinction that held local governments liable in tort when the action that gave rise to the damage was "proprietary," and immune from such liability when the action was "governmental." *See* Chester James Antieau, *Antieau on Local Government Law* § 2-35 (2d ed. 2004). The distinction at the core of the modern market participant exception – between participation in the free market and regulation of it – stands apart from the proprietary-governmental distinction, and is unquestionably vital. Indeed, the Court continues to recognize in a number of areas the difference between a government's attempt to "regulate an entire trade or profession, or to control an entire branch of private business" and an attempt to manage internal operations and property held in a proprietary capacity. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896

(1961); *cf. Engquist v. Oregon Dept. of Agric.*, 553 U.S. 591, 598 (2008).

The modern market participant exception is grounded in the deep-rooted principles of our federalism. As the Court noted in *White v. Mass. Council of Constr. Workers*, "There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." 460 U.S. 204, 207 (1983) (citation omitted). The Court's recognition of this constitutional constraint on federal power protects state and local governments' ability to structure their business relations and reflects the Court's desire to allow for "effective and creative programs for solving local problems." *Reeves*, 447 U.S. at 441. In a similar vein, the modern market participant exception also reflects a principle of "evenhandedness" that grants state and local governments acting in their proprietary capacity the same freedom possessed by private market actors to choose among trading partners. *Reeves* 447 U.S. at 438-39 (recognizing "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal"). This principle recognizes the limited impact most state and local proprietary action has on the national market that the dormant Commerce Clause and federal preemption are designed to protect, and allows governments to act in the market without raising additional concerns about the myriad ways in which governments' proprietary actions may touch on issues of public policy otherwise covered by federal legislation.

Respect for the principles of federalism and "evenhandedness" has informed the Court's decisions in all of its market participant cases. *See generally*, Dan T. Coenen, *Untangling the Market Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989). Although the Court has previously applied the exception only to cases alleging implied preemption under the NLRA and to cases alleging violations of the dormant Commerce Clause, there is absolutely no reason that the doctrine should not also apply where Congress has included an express preemption provision in a statute. Accordingly, all of the Circuit Courts of Appeals that have confronted this question have applied the doctrine in cases involving express preemption. *See Johnson v. Rancho Santiago Comty. College Dist.*, 623 F.3d 1011, 1024 (9th Cir. 2010) (applying market participant exception in preemption provisions of the Employee Retirement Income Security Act); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1043 (9th Cir. 2007) (applying exception to preemption provisions of the Clean Air Act); *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 417-18 (2d Cir. 2002) (applying exception to preemption provisions of the Telecommunication Act); *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 694 (5th Cir. 1999) (applying exception to preemption provisions of FAAAA).

As with any preemption analysis, the central question in determining whether the market participant exception applies to an express preemption

provision is one of congressional intent. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-85 (1996) ("The purpose of Congress is the ultimate touch-stone in every preemption case"); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 529 n.27 (1992) (explaining an understanding of the scope of a preemption provision turns on "a fair understanding of congressional purpose"); *Sprint Spectrum*, 283 F.3d at 419-20 (interpreting preemption provisions of Federal Communications Act to determine whether proprietary action was intended to be preempted). Congress, of course, has the power to limit state and local governments' proprietary discretion through statutory preemption provisions. However, "In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction." *Boston Harbor*, 507 U.S. at 231-32. Thus, the market participant exception's grounding in core federalism principles, together with the Court's decision in *Boston Harbor*, have created a presumption against the preemption of proprietary action. Analysis of the doctrine's applicability in a given statutory context, then, properly presumes that it applies, and may involve the search for evidence of congressional intent to preempt market participant behavior. *See id.*; *Engine Mfrs.*, 498 F.3d at 1042; *Sprint Spectrum*, 283 F.3d at 420.

Petitioner proposes the opposite analytic approach, arguing that Congress knows how to exempt

market participant behavior from express preemption and therefore the analysis should begin with the search for evidence of congressional intent to *exempt*, rather than to *preempt*. *See* Pet. Br. 27. Petitioner's proposed approach, however, would subvert the principles of federalism and evenhandedness that undergird the market participant doctrine.

What's more, the proposal proves far too much: Every statute with an express preemption provision intended to provide a degree of national uniformity would have to include a separate provision specifically exempting state and local governments' proprietary actions from preemption. Congress would have to continually reiterate that it does not intend to tell state and local governments what they can and cannot buy, sell, demand of contractors, or demand of people making use of those governments' facilities. Existing statutes with preemption provisions but without specific exemption clauses – including the Clean Air Act and the Toxic Substances Control Act, among others – could now prevent state and local governments from, for instance, buying and selling low emissions vehicles for municipal fleets or low toxicity products for municipal buildings, and from otherwise arranging for contractual relationships as they see fit. *See Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 259 (raising question "whether some of the Fleet Rules . . . can be characterized as internal state purchase decisions (and, if so, whether a different standard for preemption applies)"); *Engine Mfrs. Ass'n*, 498 F.3d at 1043

(applying exception to state and local government purchase of low emissions vehicles). Such an approach would, without any evidence of congressional intent, deny state and local governments the flexibility to serve as "laboratories" for democracy and experimentation, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting), or to exercise their proprietary prerogatives.[2]

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[2] By way of example: The City of Portland, Oregon's Sustainable Procurement Policy requires that the city consider a number of environmental factors when procuring materials, products, or services, including toxicity level, greenhouse gas emissions, and energy consumption. *See* City of Portland, City of Portland Sustainable Procurement Policy, Sept. 2010 Update 1 (2010), *available at* http://www.portlandoregon.gov/shared/cfm/image.cfm?id=204110. The City of Austin, Texas has required that the entire City fleet of vehicles be carbon neutral by 2020. Austin, Tx., Resolution No. 20070215-023 (Feb. 15, 2007). The City of Minneapolis, Minnesota has adopted a Green Fleet Policy that requires the purchase of low emissions fuels when feasible. City of Minneapolis, City of Minneapolis Green Fleet Policy 4 (2010), *available at* http://www.minneapolismn.gov/www/groups/public/@citycoordinator/documents/webcontent/convert_253782.pdf. The Montgomery County, Maryland Division of Solid Waste Services requires all County collection contractors to purchase and use collection vehicles fueled by compressed natural gas (CNG) when collecting solid waste. *See* Press Release, Montgomery County, Maryland, Montgomery County Announces First "Green" Refuse and Recycling Trucks in Mid-Atlantic Region (June 10, 2010), http://www6.montgomerycountymd.gov/apps/News/press/PR_details.asp?PrID=6670. And the City of Kansas City, Missouri posts signs notifying vehicles with environmental problems, such as heavy exhaust or leaking fluids, that they are prohibited from entering the City Hall basement garage and other city-owned and -operated garages. Although a close analysis of each of these provisions might yet

(Continued on following page)

In support of this reversal of the presumption against preemption of market participant behavior, Petitioner notes that Congress has, in two clustered circumstances, specifically exempted states' and localities' internal purchase decisions from preemption. Pet. Br. 27-28, citing 15 U.S.C. §§ 1203(b), 1476(b), 2075(b) (fabric and product flammability standards, special packaging for household products standards, and consumer product safety standards); 49 U.S.C. §§ 30103(b)(1), 32919(c), 32304(i)(2) (automobile safety standards, fuel economy standards, and motor vehicle country-of-origin labeling requirements). This small constellation of "for its own use" protection provisions is far too limited to reverse the presumption against preemption of state and local governments' authority to buy and sell goods and services, and to manage property as a private actor would. *See also*, U.S. Br. 15-19.

Petitioner also compares FAAAA's preemption provision to that in several other statutes. None of these comparisons supports Petitioner's novel proposal.

First, Petitioner overstates the similarities between Section 14501(c) and the preemption provision in the Airline Deregulation Act (ADA), 49 U.S.C.

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find them not preempted by the Clean Air Act, the Toxic Substances Control Act, the Energy Policy Conservation Act, or the FAAAA, under Petitioner's proposed analysis, each one would be presumed to be preempted unless the relevant statute expressly reserved the local governments' proprietary rights.

§ 41713(b)(3). Pet. Br., 26-27. It is true that the ADA broadly deregulated the airline industry, and that the FAAAA's deregulation of the trucking industry was generally based on that statute. *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 367-68 (2008). As Respondent City points out, however, the proprietary language in the ADA derived from prior case law addressing airport liability for noise and air pollution, and may, in any event, signal a second form of proprietary exception under that act – one that adds to the exception implied by the statute's "force and effect of law" language – rather than an exclusive one. *See* Resp. City Br., 25-26. Moreover, as the Solicitor General explains, the legislative history indicates that the ADA provision was not intended to alter existing proprietary authority exercised by airports that might affect airlines in such a way as to otherwise be construed as regulatory. *See* U.S. Br., 17-19. Ultimately, both of these points reflect a practical difference between airlines and trucking companies: Airlines *necessarily* and *only* use airports, which tend to be publicly owned. Congress therefore properly carved out airports' ability to exercise proprietary powers in relation to airlines in order to avoid the potential implication of total preemption. In contrast, there was no reason whatsoever for Congress to specify state- or city-owned facilities (such as ports, arenas, and parking garages), or state- or city-owned construction projects, or any of the numerous other possible markets in which state and local governments might participate in relation to trucks. After all, there are an estimated 15.5 million trucks on the

roads of the United States.[3] It would be difficult to guess how many of those will typically interact with a state or local government acting in a proprietary capacity; and there is no question that many of them will never drive onto a port at all.[4]

Similarly, Petitioner compares the present case to the exemption from FAAAA preemption claimed in *Rowe* and to the exemption from preemption under the Magnuson-Stevens Fishery Conservation and Management Act claimed in *City of Charleston v. A Fisherman's Best, Inc.*, 310 F.3d 155, 178-79 (4th Cir. 2002). These cases are either off-point or of dubious value. *Rowe* did not involve state or local proprietary action, but an attempt to protect the public health, and so is of no relevance here. *City of Charleston* did involve a local government's failed claim to the market participant exception, but it was an implied preemption case in an entirely different statutory setting involving entirely different statutory language with a far broader preemptive reach than in the FAAAA. In that case, the majority opined that the market participant exception would not apply to a local resolution banning certain long-line vessels from a municipal dock because nothing in the Magnuson-Stevens Act saved proprietary action from the broad

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[3] *See* TruckInfo.net, http://www.truckinfo.net/trucking/stats.htm (last visited Mar. 17, 2013).

[4] The Port of Los Angeles, the largest port in the U.S. by volume, receives visits from only 16,000 trucks per year. Pet. App. 6a, 69a.

scope of implied preemption the majority discerned in the statute's language and purposes. *City of Charleston*, 310 F.3d at 179; *but see id.* at 182-83 (Luttig., J., dissenting) (finding action was proprietary in nature and exempt from preemption). It is unclear from the decision, however, whether the majority improperly, without explanation, and in conflict with *Boston Harbor* and every other circuit that has reached this issue ignored the presumption against preemption of the market participant exception, or else, and perhaps more likely, in light of its implied preemption analysis found the presumption overcome and therefore shifted the burden of persuasion onto the city.[5]

The FAAAA provides a limited express preemption provision, which only preempts a "law, regulation, or other provision having the force and effect of law." 49 U.S.C. § 14501(c); *see also*, U.S. Br., 5 (discussing legislative history and congressional purposes behind preemption provision). Market participation,

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[5] The Magnuson-Stevens Act authorizes a federal over-ride of state fisheries management where "any State has taken *any action*, or omitted to take *any action*, the results of which will substantially and adversely affect the carrying out of" an approved Fishery Management Plan. 16 U.S.C. § 1856(b) (emphasis added). The Fourth Circuit majority concluded that this language – which covers not only "law[s], regulation[s], and other action[s] having the force and effect of law" but "any action" that will disrupt implementation of a Fishery Management Plan – together with the purposes and structure of the statute impliedly preempted the resolution. *City of Charleston*, 310 F.3d at 179. The majority also found that the local resolution was regulatory in nature, rather than proprietary. *Id.* at 173-79.

by definition, does not possess the "force and effect of law." *Cardinal Towing*, 180 F.3d at 691; *cf.*, U.S. Br., 15 ("Section 14501(c) is not naturally read to preempt contractual arrangements between government entities and motor carriers that do not differ from what private parties might agree to in the free market"). Thus, the off-street parking and placard provisions, as contractual arrangements that precisely resemble what a private landlord in the Port's position and private motor carriers in the same position as the LMCs would do, do not fall within the scope of FAAAA preemption. Moreover, Section 14501(c) offers a clear statement of congressional intent *not* to preempt market participant behavior, leaving the presumption against preemption firmly in place.

II. THE PORT ACTED AS A MARKET PARTICIPANT IN REQUIRING THE OFF-STREET PARKING AND PLACARD PROVISIONS OF THE CONCESSION CONTRACT

Application of the market participant exception to any factual circumstance involves "a single inquiry: whether the challenged program constitute[s] direct state participation in the market." *White*, 460 U.S. at 208 (quoting *Reeves*, 447 U.S. at 435 n.7) (internal quotations omitted). The Court and the Circuit Courts of Appeals have approached this "single inquiry" by emphasizing a number of different factors in what is, inevitably, a case-by-case, fact-specific analysis. *Selevan v N.Y. Thruway Auth.*, 584 F.3d 82,

93 (2d Cir. 2009). Application of these factors to the present case demonstrates that the concession contract's off-street parking and placard provisions constitute market participation. In addition, although the Court has never fully embraced the necessity of narrowly defining the "relevant market" as an applicable factor in market participant analysis, here the concession contract provisions pertain to the Port's participation, as the landlord of a container port, in the market for drayage.

A. Application of the Factors Used by Courts to Define Market Participation Supports the Respondents' Argument

Several factors consistently recur in this and the lower courts' consideration of whether state or local action is market participation: 1) the nature of the government's interest in the action; 2) the analogy between the government's action and what a private actor *could* do; 3) the analogy between the government's behavior and what a private actor *would* do; 4) the intended scope of the government's action; 5) the scope of the impacts of the government's action; and 6) whether the government's goals are primarily about public policy. *See, e.g., Chamber of Commerce of the United States v. Brown*, 554 U.S. 60, 70 (2008); *Cardinal Towing*, 180 F.3d at 693; *Johnson v. Rancho Santiago Cmty. College Dist.*, 623 F.3d 1011, 1023 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2096 (2011); *Sprint Spectrum*, 283 F.3d at 421; *Tri-M Group*, 638 F.3d at 421.

These factors reflect the Court's and the lower courts' appreciation of the principles of federalism and evenhandedness that inform the doctrine, as well as their recognition of appropriate limitations to the exception it affords.[6] Several of these factors analogize government proprietors to private actors, an analogy which affords state and local governments flexibility, promotes experimentation and innovation, and acknowledges the limited impact state and local governments acting independently in the free market can have on national economic and regulatory schemes. *Cf.* Resp. NRDC Br., 40. At the same time, several of the factors also place limits on what the market participant exception can exempt: the government's interest must be proprietary, meaning that it relates *primarily* to government operations or a business-like interest rather than to governance; the government's purposes must not be fundamentally about public policy; and the impact on downstream markets must be constrained.[7]

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[6] The Solicitor General offers a somewhat backwards conception of the market participant exception, and argues that the doctrine was developed to restrain state and local governments "purporting to act as [] market participant[s]" but who were instead acting as market regulators. U.S. Br., 16; *see also id.* at 19-21. The case law simply does not support this argument. The doctrine was developed as a defense to challenges to state and local action that can *exempt* such action from constraints imposed by the dormant Commerce Clause and federal preemption, not as a rationale for subjecting action to those constraints.

[7] The Solicitor General offers a similar view of the established principles that guide the market participant-market

(Continued on following page)

Application of these factors to the present case indicates that the Port acted as a market participant when requiring drayage companies to comply with the off-street parking and placard provisions of the concession contract.

First, as the district court found, the Ninth Circuit affirmed, and the City of Los Angeles has persuasively argued, and has not in fact been challenged by Petitioner, the Port's interest in the two provisions is proprietary, as it relates to generating community goodwill and providing other benefits that will enable the efficient use and ongoing expansion of port facilities and the accommodation of increased shipping. *See, e.g.*, Pet. App. 16a, 25a, 38a-41a; Resp. City Br., 3-5, 11-12, 30.

Second, the provisions would be well within the power of a similarly situated private actor to demand.

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regulator distinction. *See* U.S. Br., 20-21. An important difference, however, lies in the emphasis the Solicitor General places on the availability of government-specific remedies, such as civil and criminal fines and penalties. *See id.* The existence of these types of remedies, however, has never been determinative. For instance, provisions of executive order at issue in *White* included enforcement provisions, and the Equal Employment Opportunity Contract Compliance Office of the City of Boston was charged with monitoring and enforcement of the executive order and the contracts that were made pursuant to it. *Massachusetts Council of Const. Emp., Inc. v. Mayor of Boston*, 425 N.E.2d 346, 348 n.4 (Mass. 1981); *see also, Engine Manufacturers*, 498 F.3d at 1048 (rejecting argument that Fleet Rules were not proprietary because they included criminal fines and penalties for noncompliance).

Put simply, a privately-owned port, as with any private landowner, would have the power to require trucks entering its property to provide off-street parking plans and a placard providing identifying information. Petitioner argues that the concession contract is akin to a licensing scheme imposed by a regulator on a particular service sector. Pet. Br. 21. However, the Port did not invoke the regulatory authority conferred upon it by the City Charter to create an exclusive licensing scheme, nor did it grant commercial licenses to LMCs to operate anywhere else in the State of California or the City of Los Angeles. Instead, it created a concession contract, approvable by resolution or order of the Board of Harbor Commissioners and valid for a period of up to five years, with a distinct set of provisions for default and termination. *See* Pet. Br. 20-21; Pet. App., 213a-215a. The better analogy, then, as the Ninth Circuit understood, is to a real property license, in which the Port, as licensor, has granted to amendable LMCs a right of access and use and codified its consent in the concession contract. *See* Pet. App., 25a (describing "contracts under which the Port exchanges access to its property for a drayage carrier's compliance with certain conditions"); *see generally*, Powell on Real Property, Sec. 34.24; Restatement of Property Sec. 512.

Third, as Respondent Natural Resources Defense Council has elucidated in its brief, Resp. NRDC Br. 24-28, and as the Port's management and private consultants determined, Resp. City Br. 30-31, a

similarly situated private actor *should* and *would* take steps to alleviate community resistance and environmentalist opposition, and to generate community goodwill, by attempting to "grow green" and provide local community benefits. Pet. App., 7a-8a. There is no question that "Corporate America" is developing an environmental ethic and greater commitment to social responsibility, and that private companies, including some of the most powerful companies in the world, are exercising their market power to influence, and even require, improved environmental and social performance from both internal divisions and external partners. The examples of Nestlé and Starbucks, *see* Resp. NRDC Br., 29-35, are just two of many. The Ninth Circuit recognized this more than five years ago, in *Engine Manufacturers*, when, citing to the non-required conversion of truck fleets by FedEx and UPS, it declared that the public purpose of reducing air pollution was reasonably considered the decision of a rational market actor. *See* 498 F. 3d at 1046. In February 2008, Wal-Mart and Toys-R-Us stated that toys shipped to their chains would have to meet safety testing standards and other standards for lead, phthalates and other toxins that exceeded federal standards.[8] BMW, Inc. and its partner Designworks/USA have encouraged

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[8] *See* Parija V. Kavilanz, "Wal-Mart, Toys 'R' Us unveil new safety rules," CNN Money, Feb. 15, 2008, available at http://money.cnn.com/2008/02/15/news/companies/toysafety_update/index.htm.

suppliers and dealerships to become certified in international sustainability management systems.[9] Given these new realities of the contemporary business world, the Port's actions are fully consistent with the likely behavior of similarly situated private actors.

Fourth, the intended scope of the two provisions is narrowly tailored to the specific purposes of reducing diesel air pollution and creating community goodwill, thereby forestalling further litigation and facilitating the expansion of the Port. *See* Resp. City Br. 44-48. The provisions apply only to those trucks that access Port property; the placard provision only applies when drayage trucks are in and around the Port, and off-street parking provision impacts trucks that, for the most part if not entirely, park within the vicinity of the Port. *See* Resp. City Br. 4-6. The LMCs need not provide off-street parking plans for their other, non-Port related trucks and operations, nor must they display placards on their non-Port related trucks, or even on their Port trucks should they ever be used elsewhere.

Fifth, the scope of the provisions' impact is minimal. The court below found "downstream" impacts on

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[9] *See* McElhaney, Kellie, Michael W. Toffel, and Natalie Hill. "Designing Sustainability at BMW Group: The Designworks/USA Experience." *Greener Management International: The Journal of Corporate Environmental Strategy and Practice* 46 (summer 2004): 103-116, available at http://www.people.hbs.edu/mtoffel/publications/McElhaney_Toffel_Hill_2006_GMI.pdf.

drayage truck drivers to be outside the scope of the market participant exception, and that finding has not been appealed. *See* Pet. App. 41a-44a. Moreover, the potential impacts of the two provisions on the trucking industry are barely visible, if not non-existent. The provisions only impact drayage trucks that access the Port, which in total represent less than one tenth of one percent of the trucks on the road in the United States. *See* n.3 and n.4, supra, and accompanying text. Petitioner's challenge extends to an even smaller number of trucks, namely those which have not yet benefited from the Port's clean trucks subsidy program. *See* Pet. App., 90a-92a (describing $60 million invested through grants, incentives, and purchases of clean trucks). In addition, the provisions themselves are relatively insignificant, requiring drayage trucks take small measures to produce big results. Indeed, the two provisions at issue here are a far cry from Alaska's outright ban on the post-sale, out-of-state and international export of unprocessed timber by purchasers of timber logged from state lands. *See South-Central Timber*, 467 U.S. at 97 (expressing concern about "substantial regulatory effect" of timber processing requirement).

Finally, the off-street parking and placard provisions do not reflect a general policy purpose. Obviously, any state or local government action is likely to reverberate with policy implications. As the Court has noted, "[w]hen a State buys or sells, it has the attributes of both a political entity and a private business." *Reeves*, 447 U.S. at 439 n.12; *cf. Dept. of Revenue of*

Kentucky v. Davis, 553 U.S. 328, 345-50 (2008) (Souter, J.) (discussing "dual role" of governments acting as market participants). But this case is clearly distinguishable from earlier cases where the Court found states and localities used their bargaining power primarily as a means to obtain policy ends. For example, in *Wisconsin Dept. of Industry v. Gould Inc.*, the Court held that a state statute barring certain labor law violators from doing business with the state was preempted because the State's legislative rationale was to deter labor law violations, not to obtain some business benefit. 475 U.S. 282, 286-91 (1986). Similarly, in *South-Central Timber* the plurality emphasized that the timber processing requirement was expressly intended to promote industry within the State, derive tax revenue, and achieve other policy ends, and that there was no ostensible proprietary purpose to the sales restriction. 467 U.S. at 85; *see also Chamber of Commerce v. Brown*, 554 U.S. at 70. Here, by contrast, there is a clear business purpose to the challenged provisions, and there is no over-arching law they are meant to enforce or policy they are meant to pursue.

Petitioner selects a few of the above market participant factors and argues that each one is determinative. First, Petitioner argues that the market participant exception is limited to the direct procurement of goods or services or to expenditures of state-allocated funds. Pet. Br., 30-31. This argument, however, flies in the face of *Reeves*, which involved neither procurement nor expenditure but the sale of

State-produced goods. 447 U.S. at 430. Nor does it account for the fact that state and local governments frequently act as landlords who must interact, in a proprietary capacity, with a broad array of business partners.

Second, Petitioner argues that the exception is limited to instances where the state or local government action relates to "'one particular job'." Pet. Br., 30-31 (quoting *Boston Harbor*, 507 U.S. at 232). It is difficult to define what "one particular job" might mean in the context of ongoing state and local government proprietary operations, but it clearly does not mean anything as narrow as Petitioner implies. For instance, the job at issue in *Boston Harbor* was cleaning up the Boston Harbor, a "job" that involved a decade-long scope of work, cost $6.3 billion in 1993 dollars, and necessarily involved numerous constituent elements, each one of which could be considered "one particular job" itself. In *White*, the executive order establishing city-resident hiring requirements applied to all city construction contracts, not just those that pertained to a single job or project. *See* 460 U.S. at 206 n.1. In *Reeves*, the "one particular job" would have to have been the ongoing operation of the state-run cement plant and whatever occasional in-state sales preferences it might enact. *See* 447 U.S. at 430-32. Accordingly, to the extent that the scope of market participation is supposed to pertain to "one particular job," a reasonable definition of that job, in

this case, would be the ongoing operation of the Port of Los Angeles.[10]

B. The Port, as Landlord, is in the Market for Drayage Services

In *South-Central Timber*, a plurality of the Court wrote,

> The limit of the market participant doctrine must be that it allows a State to impose burdens on commerce within the market to which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.

467 U.S. at 97; *see also id.* at 102-03 (Rehnquist, J., dissenting) (calling plurality approach "unduly formalistic"). Consistent with this language, several lower courts have made defining the "relevant market" a central component to determining whether state or local government action analogous to the Port's action here is market participation exempt from statutory preemption or the dormant Commerce

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[10] The Solicitor General also addresses several of these factors in enumerating four "considerations" that office argues indicates market regulation. *See* U.S. Br., 22-25. To the extent not addressed above, the first three "considerations" are refuted by the City of Los Angeles. *See* Resp. City Br., 38-45. The fourth "consideration" is addressed in Section II, infra. *See also* Resp. City Br., 45-48; Resp. NRDC Br., 37-41.

Clause. See *Four T's, Inc. v. Little Rock Mun. Airport Comm'n*, 108 F.3d 909 (8th Cir. 1997); *Smith v. Dept. of Agric. of State of Georgia*, 630 F.2d 1081 (5th Cir. 1980), *cert. denied*, 452 U.S. 910 (1981); *Florida Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230 (11th Cir. 2012).

Should the Court consider such an analysis relevant, the Court should follow the holding of the unanimous Eighth Circuit panel in *Four T's*. There, the court held that a municipal airport commission was, as the airport's landlord, in the market for car rental services, and therefore acted as a market participant with regards to fees it charged car rental companies. 108 F.3d at 912-13; *see also*, *Crescent Towing & Salvage Co., Inc. v. Ormet Corp.*, 720 So. 2d 628, 631-32 (holding Greater Baton Rouge Port Commission a market participant in market for marine terminal facilities); *Salem Transp. Co. of New Jersey, Inc. v. Port Auth. of New York & New Jersey*, 611 F.Supp. 254, 258 (S.D.N.Y. 1985) (holding Port Authority a market participant in the market for ground transportation services); *Transp. Limousine of Long Island, Inc. v. Port Auth. of New York & New Jersey*, 571 F.Supp. 576, 581 (E.D.N.Y. 1983) (same). Here, the Port of Los Angeles, as landlord, is similarly in the market for drayage. *See Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1056 (9th Cir. 2009); *Am. Trucking Ass'ns v. City of Los Angeles*, 2010 U.S. Dist. LEXIS 88134, 17-19 (C.D. Cal. 2010); Resp. City Br., 36-37.

The Eighth Circuit's decision is in conflict with the Fifth Circuit's decision in *Smith v. Department of Agriculture of State of Georgia* and the Eleventh Circuit's recent decision in *Florida Transportation Service*. But any reading of these cases reveals that their holdings were under-justified.[11]

In *Smith*, the two judges in the majority wrote separately, finding that Georgia acted as a market regulator in granting preferences to in-state vendors for more desirable sales spaces at a farmers market that was owned, operated, and partially financed by the State. The majority opinion reached this view in what can only be described as conclusory fashion. *Smith*, 630 F.2d at 1083. The concurrence noted that the case was "close," and that reading either the majority or the dissent "alone, my impulse is to concur." *Id.* at 1085. The concurrence then wondered whether the relevant market was for the space used by sale booths, which would plainly indicate proprietary action, or for vegetables, which would "seem to"

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[11] Though the Eleventh Circuit decision is, on the surface, more closely analogous to the present case, the key distinction is between *Four T's* and *Smith*, as the Eleventh Circuit was bound by *Smith*. *See Florida Transportation Service*, 703 F.3d at 1262 n.46. Moreover, the facts pertaining to the stevedoring permit scheme at the Port of Miami, which granted exclusive operating licenses to a limited number of stevedores, *see* 703 F.3d at 1235-37, are distinguishable from the concession contracts, which grant non-exclusive access licenses to LMCs, and the actual involvement of the Port of Los Angeles in the drayage market through the grant of subsidies for and the investment of capital in cleaner drayage trucks. *See* Pet. App. 90a-92a.

indicate regulatory action, *id.* at 1086, before concluding, without explanation, that the relevant market was for vegetables. *Id.*

Judge Randall, writing in dissent, concluded that Georgia's farmer's market "amount to no more than selective dealing by the State in its commercial leasing," *id.* at 1087, and that "the State of Georgia has entered into the economic market for the provision of physical marketplaces." *Id.* at 1088. Pointedly, Judge Randall also noted that the separate opinions of the majority make little sense in comparison with *Alexandria Scrap*, where the Court held that a state subsidy that established a market for the sale of hulks was proprietary action, or *Reeves*, in which defining the "relevant market" was a non-issue. *Id.* In *Four T's*, the Eighth Circuit followed the reasoning of Judge Randall's dissent.

Ultimately, this case should be governed by the Court's decision in *Boston Harbor*. In that case, a public agency entered into project labor agreements that required contractors to sign agreements with third parties, namely labor unions, in order to prevent projects from being disrupted by labor disputes. 507 U.S. at 221-22. The Court held that the state agency could enter into such agreements – even though they may have otherwise been preempted by the NLRA – because it was acting as an owner or manager of property that "must interact with private participants in the marketplace." *Id.* at 227. The Court acknowledged that the agreements could produce economic benefits that a public proprietor,

just like a private proprietor, should be free to seek. *Id.* The case here is similar: the Port, as a public proprietor, entered into contracts with LMCs that will enhance the Port's ability to grow and provide distinct economic benefits to it. The Court should recognize the business necessity of the concession contract – which is limited in scope, impact, and duration – and allow the Port to get on with its business.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-798

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IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Petitioner,

v.

THE CITY OF LOS ANGELES, THE HARBOR DEPARTMENT OF THE CITY OF LOS ANGELES, THE BOARD OF HARBOR COMMISSIONERS OF THE CITY OF LOS ANGELES,
Respondents,

and

NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, COALITION FOR CLEAN AIR, INC.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The Owner-Operator Independent Drivers Association, Inc. ("OOIDA"), is a trade association made up of independent, small business, and professional truck operators, many of whom serve the Port of Los Angeles (the "Port") and are subject to the Port's Concession Agreement that is at issue in this litigation.[1] OOIDA is a not-for-profit corporation incorporated in 1973 under the laws of the State of Missouri, with its principal place of business in Grain Valley, Missouri. OOIDA is the largest international trade association representing the interests of independent owner-operators, small-business motor carriers and professional drivers. The 150,000 members of OOIDA are professional drivers and small-business men and women located in all 50 states and Canada. One-truck motor carriers represent nearly half the total number of active motor carriers operating in the United States while approximately 96 percent of active motor carriers operate 20 or fewer trucks. OOIDA filed a brief as *amicus curiae* in support of Petitioner American Trucking Associations, Inc., ("ATA") in this action before the U.S. Court of Appeals for the Ninth Circuit.

OOIDA submits this brief as *amicus curiae* to describe how the issues before the Court affect long-haul interstate truck operators, and how the Court's decision could affect interstate trucking in the future. While the Port of Los Angeles' Concession Agreement appears focused on local drayage truck operators who

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[1] Under Supreme Court Rule 37.6, no party's counsel authored this brief in whole or in part. No party, party's counsel, or person – other than the *amici curiae* – contributed money intended to fund preparing or submitting this brief. All parties consented to the filing of this *amicus* brief.

require daily entry into the port, thousands of long-haul interstate truck operators who haul the occasional load to the Port are also subject to the Concession Agreement.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

On a broad scale, the NFIB Legal Center is concerned that an expansive interpretation of the market participant doctrine will increase the number of state and local rules in regulated areas that its

members now rely upon as the subject of federal preemption. On a practical scale, NFIB members who are shippers are concerned that the marketplace of truck transportation to the Port of L.A. is now smaller, and that they are not able to choose the most cost effective or efficient truck transportation. They are concerned that these restrictions on interstate commerce may increase their costs of shippings goods through the Port of Los Angeles and through other ports that adopt similar rules.

SUMMARY OF THE ARGUMENT

By imposing rules and conditions upon trucks entering the Port of Los Angeles, the Port erected the type of obstacles to interstate truck transportation that Congress explicitly prohibited under the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1) ("FAAAA"). To enforce the Concession Agreement, the Port denies non-compliant carriers access to Port property. This is an exercise of authority over motor carrier operations that Congress exclusively granted to the Secretary of the United States Department of Transportation.

These rules reduce the business opportunities of motor carriers, including OOIDA members, who take occasional loads to the Port. They also reduce the transportation options of shippers, such as members of NFIB, who face a smaller marketplace of motor carriers from which to acquire the most efficient or cost effective transportation to the Port. OOIDA and NFIB are concerned that precedent favorable to the Port will predictably lead to a proliferation of non-uniform rules and restrictions on motor carriers in different regions and localities. This would only compound the burdens on interstate commerce. An expansive interpretation of the marketplace partici-

pant doctrine may also give state and local governments a new opportunity to enact rules affecting interstate commerce beyond the issues raised by the ports and beyond the area of motor carrier federal preemption found in the Federal Aviation Administration Authorization Act.

Finally, for decades the U.S. Department of Transportation ("DOT") has been the sole authority to grant motor carriers the authority to operate in interstate commerce. DOT has only permitted states to affect that authority in very specific and limited ways. The principles that underlie the court's decision in *Castle v. Hayes Freight Line, Inc.*, 348 U.S. 61 (1954), remain a consistent and reliable component of the federal regulation of the motor carrier industry. Both OOIDA and NFIB urge the court to overturn the Ninth Circuit's decision.

ARGUMENT

I. THE MARKET PARTICIPANT DOCTRINE IS INAPPLICABLE IN THIS CASE.

A. The Port Does Not Contract With Motor Carriers or Participate in the Motor Carrier Marketplace.

The Ninth Circuit decided that the Port's off-street parking and placard requirements are proprietary in nature and fall into the market participant exception to the FAAAA preemption provision because they are intended to generate good will within the community surrounding the Port – good will that is necessary for the Port to gain local support for its expansion plans. *ATA v. City of Los Angeles*, 660 F.3d 384, 406-7, 409 (9th Cir 2011). In analyzing the market participant doctrine, this court stated, "In this kind of case there is 'a single inquiry: whether the challenged 'program

constituted direct state participation in the market.'" *White v. Massachusetts Council of Const. Employers, Inc.*, 460 U.S. 204 (1983), *quoting Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980). The Court has limited the application of this doctrine to instances of state action "directly related to the procurement of goods and services." *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 70 (2008). At no point, however, has the Port entered into or participated in the trucking marketplace. The Port is not in privity of contract with the motor carriers regulated by the Concession Agreement. Motor carrier serve either the tenants of the Port or the tenants' customers, not the Port.

The provisions of the Concession Agreement being challenged do not concern any decision regarding the Port's spending of money for goods and services from the motor carriers regulated by the Concession Agreement.

The Port's stated goal for the Concession Agreement – to generate good will among its neighboring community – is more akin to regulation to serve the public interest than it is to participate in a marketplace. The good will sought by the Port is not the good will that a marketplace participant nurtures among its customers to increase loyalty and sales for economic gain. It is the good will that it believes it needs from its neighbors for political gain – to obtain local governmental approval for Port expansion. The Concession Agreement has only a remote and secondary connection to the Port's economic interests.

B. The Challenged Rules Regulate Motor Carriers.

The Ninth Circuit was also incorrect to hold that, because the Port's *goals* were economic in nature, the

Concession Agreement's rules were proprietary decisions falling into the market participant exception. *ATA v. City of Los Angeles*, 660 F.3d 384, 406-7, 409 (9th Cir. 2011). Several Circuits have held, however, that "[f]ederal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment." *Engine Manufacturers Assoc. v. South Coast Air Quality District*, 498 F.3d 1031, 1046 (9th Cir. 2007); *quoting N. Ill. Chapter of Assoc. Builders & Contractors, Inc., v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005) (emphasis in original).

In this case, the Ninth Circuit's analysis rests entirely on the Port's goal to achieve good will among its neighbors, not on its actions. While the Port's goals may have some economic aspiration, the Concession Agreement rules do not constitute marketplace decision-making. The Ninth Circuit's expansive interpretation of the marketplace participant doctrine would place no boundary on a local government action and would leave little, if anything, supporting the principle of federal preemption, including explicit statutory preemption such as provided in the FAAAA.

II. THE FEDERAL GOVERNMENT'S EXCLUSIVE AUTHORITY TO REGULATE MOTOR CARRIER OPERATING AUTHORITY UNDERLYING THE SUPREME COURT'S DECISION IN *CASTLE* REMAINS UNCHANGED.

Despite the number of years since the Court decided *Castle v. Hayes Freight Lines, Inc.*, *supra.*, and the changes to the regulation of the trucking industry in the interim, the federal government has rigorously maintained and controlled its sole auth-

ority to grant, deny, revoke, or suspend a motor carrier's authority to operate in interstate commerce. States have been given contractual authority to enforce motor carrier laws under the various provisions of the Motor Carrier Safety Assistance Program (49 U.S.C. 31100-31104, 31108, 31136, 31140-31141, 31161, 31310-31311, 31502), but never have states been authorized to create or institute penalties affecting a motor carrier's authority to operate in interstate commerce. Only in the rarest of limited, specifically defined circumstances has the federal government given the states the ability to affect a motor carrier's right to operate in interstate commerce. This conclusion is further bolstered by more recent Supreme Court jurisprudence.

Under 49 U.S.C. § 13902(a)(1), the Secretary is required to issue motor carrier operating authority if it finds that the applicant is, *inter alia*, willing and able to comply with motor carrier safety statutes, any safety regulations promulgated by FMCSA, the safety fitness requirements established by FMCSA under Section 31144, the minimum financial responsibility requirements established under Sections 13906 and 31139, and the duties of employers and employees under Section 31135.[2] Section 13902(a)(4) mandates that the Secretary "shall withhold registration" if he determines that a registrant "does not meet, or is not able to meet" any of the aforementioned requirements.

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[2] A motor carrier must also be willing and able to comply with regulations referred to in Section 13902(a)(1)(A), the scope of which was left open to further interpretation by FMCSA in *Peter Pan Bus Lines v. FMCSA*, 471 F.3d 1350, 1354-55 (D.C. Cir. 2006).

In *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), the Court addressed the Secretary's authority under Section 13902(a)(1) holding that he had "no discretion" under this provision (*Id.* at 770) to prevent entry of Mexican trucks operated by motor carriers that satisfied the conditions in this section. *Id.* at 767. By necessary implication, FMCSA would also have no discretion under Section 13902(a)(4), but to deny registration (operating authority) to a motor carrier who "does not meet, or is unable to meet the requirements in Section 13902(a)(1)." The Court's decision affirms the narrowness of the Secretary's discretion to grant or to deny motor carrier operating authority.

Consistent with this narrow statutory authority, once a motor carrier has been granted federal authority to operate in interstate commerce, FMCSA provides for its revocation or temporary suspension only after a thorough administrative process pursuant to which the agency determines whether the carrier has committed a pattern of non-compliance with the rules described in Section 13902(a). *See* 49 C.F.R. Part 386.

Outside of the administrative process, FMCSA has promulgated specific rules for the partial and temporary revocation of that authority to operate – in the limited circumstances when a driver or equipment may be placed out of service on the roadside until specific unsafe conditions are remedied. These include equipment defects (49 C.F.R. § 396.9), violations of the driver hours-of-service and logbook rules (49 C.F.R. § 395.13(b)(1) and (2)); alcohol use (49 C.F.R. § 392.5(c)), and operating without or beyond federal operating authority (49 C.F.R. § 392.9a). Here the Secretary has carefully chosen specific

violations of the rules that states may use to temporarily limit a motor carrier's operation.

The Port's Concession Agreement restrictions on motor carrier operations are not authorized by federal law. They extend far beyond the bases for denying operating authority described in 49 U.S.C. § 13902 or temporarily suspending a motor carrier's operation under the rules listed above. No other federal statute or rule defines any other circumstance or gives authority to any party to revoke, suspend, or deny a properly qualified motor carrier from operating in interstate commerce. OOIDA urges the Court to affirm *Castle* and maintain this consistent and reliable regulatory scheme by recognizing the federal government's ongoing exclusive authority to grant or revoke interstate motor carrier operating authority under the narrow circumstances described in Section 13902.

III. THE BREADTH OF INTERSTATE COMMERCE AFFECTED BY THE CONCESSION AGREEMENT

The principle behind the FAAAA's preemption provision, the principle behind the historically limited reach of the market participant doctrine, and the principle behind the federal government's ability to maintain sole authority to control a motor carrier's operating authority, are the same: to limit restrictions on the free flow of interstate commerce. While the Port may have only intended to regulate local drayage carriers serving the Port, the impact that the Port's Concession Agreement has on members of OOIDA and NFIB illustrate the breadth of the negative impact that the Port's rules will have on interstate commerce.

A. The Impact of the Concession Program on the Long-Haul Motor Carrier Industry

The Port of Los Angeles Concession Agreement affects many segments of the motor carrier industry. Typically, motor carriers perform the traditional drayage of containers to and from the Port and warehouses and rail heads located within 100 miles of the Port in the Los Angeles basin. This is the type of operation that is the focus of the Port's Concession Agreement.

But the Concession Agreement is not limited in its application to these local short-haul container movements. The Port's definition of "drayage truck" under the Concession Agreement is a class 7 (or larger) vehicle that transgresses port property:

> "Drayage Truck" means any in-use On-Road Vehicle with a Gross Vehicle Weight Rating greater than 26,000 that pulls a trailer or chassis used for transporting cargo[. . .]operating on or transgressing through Port Property for the purpose of loading, unloading or transporting cargo, empty containers or chassis that originated from or is destined for Port Property.

PORT OF LOS ANGELES – TARIFF NO. 4, Item No. 2000.[3]

This definition embraces many interstate truck operators, including OOIDA members, who haul goods intended for export into the Port that originate from locations throughout North America (outside of the L.A. Basin and outside of California). For exam-

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[3] *See* http://www.portoflosangeles.org/Tariff/SEC20.pdf (last accessed February 19, 2013).

ple, an owner-operator may haul fresh or frozen meat on refrigerated trailers from the beef producing regions in the U.S. to the Port. The reverse is also true: OOIDA members may be sent into the Port to pick-up goods destined for locations throughout North America.

Other non-drayage truck operators that nonetheless fall under the Port's definition of a "Drayage Truck" include those who enter the Port to deliver and pick-up general freight; owner-operators who operate dump-trucks hauling various bulk commodities (asphalt or fill); owner-operators who haul fuel or chemicals in tankers; and owner-operators who operate flat-bed trucks or specialized equipment hauling containers loaded on their own conveyances (as opposed to an intermodal chassis) or haul heavy-construction equipment being imported or exported. OOIDA members also deliver goods intended to aid Port infrastructure projects.

The Concession Program has an adverse impact on OOIDA members for each of these types of non-drayage, long-haul interstate operations. Were the Court to permit the Port to maintain these Concession Agreement requirements, it would be an invitation for other ports and other localities to create their own rules and ordinances affecting interstate truck operators. The creation of a patchwork quilt of different rules on interstate carriers would create enormous burdens on interstate truck transportation.

Currently, properly authorized and licensed motor carriers can accept a load going anywhere in the country without having to worry about the vagaries of state and local control over their freedom of movement. This marketplace condition maximizes efficiency and competition in the trucking marketplace.

Were additional ports given license to use their market participant discretion to create similar concession agreements, motor carriers would either have to keep up with different local port rules and the costs associated with compliance, or they would face lost business opportunities and reduced geographic areas in which to operate. These are the burdens and restrictions on interstate truck transportation that the preemption provision in the FAAAA at 49 U.S.C. § 14105(c)(1) and the anti-placarding provision at 49 U.S.C. § 14506 were intended to abolish.

B. The Impact on Shippers and Other Parties

Not only do the Port's rules affect long-haul motor carriers, they affect the transportation options of shippers doing business in interstate and international commerce through the Port, including members of NFIB. Under the Concession Agreement, shippers now face a shrinking marketplace of motor carriers qualified to take their goods to the Port. Shippers must either find and pay the higher rates of motor carriers qualified under the Concession Agreement, or they must pay additional fees to have their loads hauled to Los Angeles and then transferred near the Port to a qualified motor carrier to complete the haul into the Port.

NFIB members are also concerned that if the Port of Los Angeles was permitted to maintain its Concession Agreement, then other ports around the country would follow suit, further increasing the burdens, costs, and barriers to shipping and hauling goods in interstate and international commerce.

C. The Precedential Impact in Other Marketplaces

Finally, both OOIDA and NFIB are concerned that were the Court to adopt the expansive "good will" interpretation of the market participant doctrine permitted by the Ninth Circuit, then state and local governments beyond port authorities would seize the opportunity to enact new rules and ordinances affecting industries other than truck transportation – in marketplaces that are now reliably and predictably preempted by federal law.

CONCLUSION

The amici urge the court to reverse the Ninth Circuits' decision and bring clarity to the laws that apply to interstate truck operators and the port authorities who seek to exert greater control over them.

Respectfully submitted,

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